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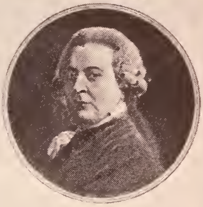

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A METHODICAL

SYSTEM OF Univerſal Law:

OR, THE

LAWS *of* NATURE *and* NATIONS

DEDUCED

From CERTAIN PRINCIPLES, and applied to PROPER CASES.

Written in *Latin* by the CELEBRATED

JO. GOT. HEINECCIUS,

Counſellor of State to the King of PRUSSIA,
and Profeſſor of PHILOSOPHY at *Hall.*

TRANSLATED, and illuſtrated with NOTES and SUPPLEMENTS,

By *GEORGE TURNBULL*, LL. D.

To which is added,

A DISCOURSE upon the NATURE and ORIGINE of MORAL and CIVIL LAWS; in which they are deduced, by an Analyſis of the Human Mind in the experimental Way, from our internal Principles and Diſpoſitions.

Natura enim juris ab hominis repetenda natura eſt. CIC.

VOL. I.

LONDON:
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TO

His ROYAL HIGHNESS,

WILLIAM

Duke of *Cumberland*,

This TRANSLATION of

A SYSTEM of the LAW of NATURE and NATIONS, Written in *Latin* by the celebrated *Jo. Got. Heineccius*, Counſellor of State to the late King of *Pruſſia*, and Profeſſor of Philoſophy at *Hall:* With the Supplements and Diſcourſes added to it,

Is moſt humbly dedicated,

In Veneration of His ROYAL HIGHNESS's many great and amiable Qualities, ſo becoming His high Birth and exalted Rank, the ſuitable Care beſtowed upon His Education, and the Royal Example He has daily before His Eyes, of true Greatneſs, and the beſt Uſe of Power,

By His ROYAL HIGHNESS's

moſt devoted and

moſt obedient Servant,

GEORGE TURNBULL.

PREFACE.

THE author of this ſyſtem of the law of nature and nations is ſo well known, and in ſo high eſteem in the republic of letters, that it would be arrogance in me to ſay any thing in recommendation of his works. Nor need I make any apology for tranſlating into our language ſo excellent a book upon a ſubject of ſuch univerſal importance. For the knowledge of juſtice and equity muſt be owned to be neceſſary in ſome degree to every one; but to thoſe, in a particular manner, whoſe birth and fortunes afford them time and means, and call upon them to qualify themſelves for the higher ſtations in civil ſociety. Man, and the rights and duties of man, are certainly the moſt proper objects of human ſtudy in general. And ſurely Socrates *had reaſon to ſay, "That if no man can be fit to undertake a trade, how mean and mechanical ſoever, without having been educated to it, and beſtowed ſome conſiderable time upon the learning of it, it muſt be abſurd to think one can be qualified for diſcharging public truſts and duties, without having taken great pains to inſtruct themſelves in the principles of equity, the ends and intereſts of civil ſociety, and the nature, ſpirit, and intention of laws." I ſhall only add, that every ſcience hath its elements; and this treatiſe at leaſt well deſerves to be called an excellent introduction to the ſcience of laws. As for the notes and ſupplements I have added, how far they are neceſſary, I muſt leave it to the reader to judge. The greater part of them relates to one queſtion,* viz. *The origine of civil government, which hath not been ſet in its true light by any other writer beſides him from whom the illuſtration of this point is here borrowed. The diſcourſe upon the origine and nature of laws, is an attempt to introduce the* *experimental way of reaſoning into morals, or to deduce human duties from internal principles and diſpoſitions in the human mind. And hence certainly muſt the virtues belonging to man be deduced: hence certainly muſt the laws relating to the human nature and ſtate be inferred, as Cicero in his excellent treatiſe of laws, has long ago told us.*—Quid ſit homini tributum natura, quantam vim rerum optimarum contineat; cujus muneris colendi, efficiendique cauſa nati, & in lucem editi ſimus, quæ ſit conjunctio hominum, & quæ naturalis ſocietas inter ipſos; — his enim explicatis fons legum & juris inveniri poteſt. *i. e. 'Tis by diſcovering the qualities and powers with which men are endued by nature; and the beſt ends within human reach; the purpoſes or offices for which we are fitted and made; and the various bonds by which mankind are knit and united together, and thus prompted to, and formed for ſociety.—'Tis only by diſcovering and unfolding theſe important matters, that the ſource of human rights and duties can be laid open." I have not tranſlated our author's preface; becauſe it is principally deſigned to ſhew that the Roman law can now have no other authority in deciding controverſies between independent nations or ſtates, than as it is founded upon principles of natural equity; and it is filled up with an enumeration of the titles in the civil law, ſome have vainly thought ſufficient to determine all queſtions of this kind, which it would have been of very little uſe to have attempted to engliſh.*

OCTOBER 28.
1740.

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To all which is added a diſcourſe on the nature and origine of moral and civil laws, in which moral and civil laws are deduced, in the experimental way, by an analyſis of human nature, from our internal diſpoſitions and principles, and our ſituation.

THE LAWS OF NATURE *and* NATIONS *deduced*, &c.

BOOK I.

Of the LAW *of* NATURE.

CHAP. I.

Concerning the origine and foundation of the LAW *of* NATURE *and* NATIONS.

Sect. I.

WHATEVER tends to preſerve and perfect man is called *good* with reſpect to man: whatever hath a contrary tendency is called *ill* with regard to him *: every action therefore which contributes to human preſervation and perfection is a *good action*; and every action is *evil* which tends to hurt and deſtroy man, or to hinder his advancement to the perfection of which his nature is capable.

What conſtitutes a good, and what a bad action?

Sect. II.

Whatever conduces in any manner or degree towards our duration, or the continuance of our preſent ſtate, is ſaid to be *preſervative* of man: whatever promotes and augments thoſe properties, which belonging to human nature, and conſtituting our ſtate and rank, admits of degrees, is called *perfective* of man *. Whence it is eaſy to under-

What preſervation and perfection mean, and what deſtruction and imperfection?

ſtand what may be ſaid to hurt, wrong, or degrade us.

* This is the true idea of perfection according to *Simplicius*, who upon *Epictetus Enchir.* cap. 34. obſerves, to have not only a beginning and a middle, but likewiſe an end, is the characteriſtick of *perfection.* So *Ariſtotle* likewiſe, in Meta. c. 4. 16. where having examined the meaning of ſeveral different terms, he reduces them all to the ſame idea.

Sect. III.

Men have power to act well or ill.

Such being the nature of human will, that it always deſires *good*, and abhors *ill* * ; it cannot but like thoſe actions which tend to our *preſervation and perfection*, and it cannot but diſlike thoſe actions which tend to our *hurt and imperfection:* But becauſe *good and ill* may be really what they appear to be, and on the other hand, a ſeeming *good* may be a real *evil*, and a ſeeming *evil* may be a real *good* *; it very often happens, that like *Ixion* in the fable, we embrace an empty cloud inſtead of *Juno*; *i. e.* we are deceived by appearances, and miſtake ſeeming for ſolid good, and a falſe ſemblance of *ill* for real *ill*; and thus we may make a bad or a good choice, be right or wrong in our elections, and conſequently in our actions *.

* This is obſerved by *Simplicius* upon *Epictet.* Enchir. cap. 34. where he greatly exalts human liberty, and defines it to be that free conſtitution of the human mind, in conſequence of which it voluntarily, and without any conſtraint, ſometimes purſues true, and ſometimes imaginary good.

Sect. IV.

Wherefore men ſtand in need of ſome rule by which they may direct their actions,

Now the power of preferring one or other of two poſſibles, and by conſequence of acting well or ill, is called *liberty:* this power we experience; wherefore it cannot be denied that there are, with regard to us, free actions which are good, and free actions which are bad. But ſince all things, which may be rightly directed or perverted, ſtand in need of a rule by which they may be rightly directed, it follows that our free actions ought to be directed by ſome rule *.

* Thus *Epictetus* reaſons in *Arrian*, l. 2. c. xi. Do you think all things are right which appear to be ſuch to any one? but how can things, which are directly repugnant to one another, be both right? it is not therefore enough to make a thing right that it appears to ſome one to be ſuch, ſince in weighing or meaſuring things we do not truſt to appearances, but apply a ſtandard. For ſhall there be a certain meaſure with regard to theſe things, and none other with reſpect to our actions beſides fancy or appearance? How can it be that there ſhould be no rule, or none which can be aſcertained with reſpect to human conduct, than which nothing is ſo neceſſary?

Sect. V.

And this rule muſt be right or juſt, ſure and immutable.

By a rule here we underſtand an evident *criterion* by which *good and ill* may be certainly diſtinguiſhed. And in order to anſwer that end, a rule muſt be true, right or juſt, clear, certain and conſtant. For ſuppoſe the rule not to be juſt, and that which is ruled by it will not be juſt or right. Suppoſe it not to be clear and certain, and it cannot be a ſure *criterion* of good and evil. Finally, if we ſuppoſe it to be uncertain and variable, an action regulated by it will ſometimes be good and ſometimes be bad: and therefore in none of theſe caſes would it deſerve the name of a rule *.

* So true is that of *Lucret. de rerum nat. l.* 4. *v.* 515.

Si prava eſt regula prima,
Normaque ſi fallax rectis regionibus exit,
Et libella aliqua ſi ex parte claudicat hilum:
Omnia mendoſe fieri atque obſtipa, neceſſum eſt,
Prava, cubantia, prona, ſupina atque abſona tecta,
Jam ruere ut quædam videantur velle, ruantque,
Prodita judiciis fallacibus omnia primis.

Sect. VI.

It muſt likewiſe be obligatory.

Further, a rule of action would be but of little advantage to mankind, if it were not of ſuch a kind, that it carried with it ſome *motive* (as it is called) by which human will might be impelled to make uſe of it, and apply it. Becauſe man never acts without ſomething preſent to his mind, by which he is excited or impelled to act; he will therefore not apply a rule, or at leaſt he will be very indifferent whether he applies it or no, unleſs he be ſtimulated by ſome motive to apply it. But ſince we call the connection between a motive and a free action *obligation*, that a rule for the direction of human actions may anſwer its end, it muſt be *obligatory*.

Sect. VII.

What is obligation, and how many kinds of it are there?

Obligation is a connection between motives and free actions, (§ 6.) and motives muſt conſiſt either in the intrinſic goodneſs and pravity of actions themſelves, or ariſe from the will of ſome Being whoſe authority we acknowledge, commanding and forbidding certain actions under a penalty. And therefore the former ſpecies of *obligation* is called *internal*; the latter is called *external**. The firſt excites to *good actions*, the other to *juſt actions*. But right is the correlate (as it is called in the ſchools) to both. For if one perſon be under an *obligation*, ſome other perſon hath a right or title to exact ſomething from him.

Sect. VIII.

Internal obligation is not ſufficient.

Hence it is manifeſt, that a rule which carries only an *internal obligation* with it, is not ſufficient with reſpect to mankind: for ſince this obligation ſolely ariſes from the goodneſs of the action, (§ 7), and therefore only excites a perſon to act by this motive, *viz.* that his action may be good; but man is ſo framed by nature, that he often embraces a falſe appearance of good for what is really ſuch *: (§ 3) Such a rule muſt be uncertain, and for that reaſon it is not deſerving of being called a rule (§ 5).

* We don't deny that the internal is the nobler ſpecies of obligation, being that which influences all wiſe and good men, according to the noted maxim:

Oderunt peccare boni virtutis amore.

It is true the ancients praiſe the primitive race of mankind in the early ages of the world chiefly on this account, that they acted well, and did good and right, without any law compelling them to ſuch conduct, from a virtuous diſpoſition, and with free choice. (*Seneca*, *Ep.* 90. "The firſt of mankind, and their progeny, followed the dictates of pure uncorrupted nature as their law and guide." So ***Ovid*** likewiſe, Metam. l. 1. v. 90. So *Tacitus* Ann. 3. 26. and *Saluſt*. Catil. cap. 9.) But we deny it to be ſufficient to conſtitute a rule, becauſe we are enquiring after one founded in nature, and common to the good and bad, wiſe and fooliſh, in ſuch a manner, that when reaſon is not able to keep them to their duty, an external obligation, or which comes to the ſame thing, the fear of ſuffering may reſtrain them.

Ne vaga proſiliat frænis natura remotis.
Horat. l. 2. Serm. ſat. 7. v. 74.

Sect. IX.

An external obligation either perfect or imperfect is therefore wanting.

But if a *rule* only carrying an *internal obligation* with it, would be uncertain, there is need of one which may produce an *external obligation* ariſing from the will of ſome Being whoſe authority we acknowledge. Since therefore that Being may oblige us to the practice of virtue and honeſty, either without co-action, or may command and forbid certain actions with penalties and rewards, the former ſpecies of external obligation is properly denominated *imperfect*, and the latter *perfect*. Now the will of a ſuperior commanding and forbidding under penalty is called a *law*: and therefore a rule for the direction of our free actions, to conform to which we are under *perfect obligation*, muſt conſiſt of *laws*, and a ſyſtem of ſuch is termed by way of eminence *law* *.

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* (*Jus*) *Law*, when it is uſed to ſignify a rule of human action, is a ſyſtem of all the laws of one and the ſame

kind. (Elem. Inſt. § 33.) (*Jus*) *Law* therefore, 'tis plain from the origine of the word itſelf, cannot be conceived, without referring it to the will of a ſuperior, and ſuppoſing an external obligation. For it is not derived from Δέον, as *Menage* would have it, Amœn. Juris. cap. 39. p. 295; nor from *Jove*, as *Scipio*, Gent. Orig. p. 270 has aſſerted, and after him *Grotius*, Proleg. Jur. belli & pacis, § 12; but from the Word *jubendo.* For inſtead of *Jura*, the ancients uſed *juſa* or *juſſa*. Feſtus, juſa, jura. So Hieron. Magii, var. lect. 4. 1. In like manner, the German word *Recht* is ſhewn by Jo. Geo. Wachter. Gloſſ. p. 1251, to include in it *the idea of* law, or the will of a ſuperior directing human actions.

Sect. X.

Of this law there can be no other author but God.

Now, ſince that Being may be juſtly denominated our ſuperior, upon whom our being and happineſs abſolutely depend, and whoſe authority we are obliged to acknowledge, becauſe he has a juſt title to exact obedience from us, and hath power to propoſe penalties to us in caſe of our refuſing to obey him; and, it appears by many moſt evident arguments, that he never hath renounced, nor never can renounce his authority to rule and command us*: That ſuperior Being whoſe authority we are obliged to acknowledge, can be no other than the moſt great and good God; and he therefore is the ſole author of that law, which ought, as we have ſaid, to be the rule of action to all mankind.

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* Not only is the *perfection and goodneſs* of a Being a juſt title to exact obedience, as is affirmed by *Moſ. Amyraldus* Diſſer. de jure Dei in res creatas, agreeably to that well known ſaying of Democritus: φύσει τὸ ἄρχειν οἰκήϊον τῷ κρείσσονι. Authority falls by nature to the ſhare of what is beſt. Stob. Serm. 37. But *dependence* is alſo ſuch. For who will deny that he hath a juſt claim to our obedience to whom we owe our exiſtence and preſervation? God therefore hath a right to command our ſubmiſſion and obedience: *He in whom we live, move, and have our being*, Acts 17. 28. Beſides, that he can inflict puniſhments on the diſobedient and rebellious, his omnipotence and juſtice leave

no room to doubt. (Elem. phil. mor. § 185 & ſeq.) Finally, if he had, or ſhould ever renounce his authority over men, and all created beings, that would be unworthy of his wiſdom and goodneſs; becauſe, being infinitely wiſe, he muſt know that we would be moſt miſerable without his government and rule, and being infinitely good, he cannot abandon his creature, which cannot guide itſelf, and ſo expoſe it to the greateſt miſery. But what is repugnant to his wiſdom and goodneſs, that he can neither will nor do, it is allowed. Wherefore, he neither will nor can renounce his ſupreme juriſdiction over men and all creatures. It is proper to obſerve this in oppoſition to the celebrated Leibnitz, who, the illuſtrious Sam. a Cocceis, Diſſer. de principio juris naturalis unico vero adæquato, publiſhed at Francf. 1699, having by ſolid arguments demonſtrated that there can be no other principle of natural law but the will of God, in the 1700, Ephemeridibus Hanoveranis for the month of July, objected againſt that hypotheſis, among other things, " That according to it, if we ſuppoſe a creature to have ſo much power, that being once produced by its creator, it could not be compelled by him; ſuch a creature muſt be conſidered as manumitted by its creator, in the ſame manner as children, when they come to ſuch a degree of power, that they cannot be compelled by their parents." For to ſuppoſe ſuch a caſe, is the wildeſt extravagance, ſince it implies a manifeſt contradiction, to imagine a finite Creature arrived to ſuch power that it can no longer be compelled by its Creator, an infinitely powerful Being. And no leſs abſurd are all the other fictions he puts, in order to invalidate that learned man's doctrine, as this for inſtance, " That if we ſuppoſe an evil genius to have ſupreme uncontroulable power, ſuch an evil genius would not, becauſe irreſiſtible, ceaſe to be wicked, unjuſt and tyranical." For we cannot ſuppoſe an evil genius to have ſupreme power, if we believe the divine exiſtence. And if we deny the exiſtence of God, it is abſurd to ſuppoſe an evil genius, or indeed any created thing to exiſt. It is a ſtrong argument of truth, when a propoſition cannot be overturned but by ſuppoſitions which include a manifeſt contradiction.

Sect. XI.

This law is made known to

Becauſe we are enquiring, as appears from what hath been ſaid, for no other rule of right but what mankind in no other way but by reaſon.

God hath given to the whole human race for the rule of their conduct, (§ 10) hence it follows that this rule muſt be intelligible to all mankind. But ſince what is intelligible to, or may be known by all mankind, muſt be diſcovered to them either by a divine revelation, which all men acknowledge and receive as ſuch, or muſt be diſcoverable by the uſe of natural reaſon; becauſe ſuch a revelation as hath been mentioned never exiſted: it is obvious that the law of nature muſt mean laws within the diſcovery of all mankind by the uſe of reaſon common to all mankind, and which therefore are by nature promulgated to all mankind *.

* Hence Cicero in his oration for Milo, c. 4. calls it Jus non ſcriptum ſed natum. "Law, or a rule of rectitude not written but cogenial; a rule which we have not learned, read, received by tradition, but which nature itſelf hath impreſſed upon us, and which we imbibe and draw from it; to the knowledge of which we are not formed and trained by education or example, but we are originally tinctured and ſtamped with it." So the apoſtle likewiſe ſays, "The Gentiles, which have not the law, are a law unto themſelves, which ſhew the works of the law written in their hearts." This cannot be otherwiſe than by reaſoning; and therefore by the right uſe of reaſon: this is the unanimous doctrine of all, who have, as it were, by compact, placed the law of nature in the *dictates of right reaſon*; a few only excepted, who have maintained there is nothing juſt or right by nature, as *Archelaus* in *Laertius*, 2. 16. Ariſtippus, according to the ſame writer, 2. 93. *Carneades* in *Lactantius*, Inſtit. divin. c. 14. & 19: *Pyrrho* in *Sextus Empyricus*, Hypot. 3. 24. and to thoſe *Ariſtotle* may be added, who, as Menage has proved at the 7: 128. p. 311. of Laertius, was not far from that opinion.

Sect. XII.

A definition of the law of nature and of juriſprudence, natural or divine.

The law of nature, or the natural rule of rectitude, is a ſyſtem of laws promulgated by the eternal God to the whole human race by reaſon. But if you would rather conſider it as a ſcience, natural morality will be rightly defined the practical habit of diſcovering the will of the ſupreme legiſlator by reaſon, and of applying it as a rule to every particular caſe that occurs. Now, becauſe it conſiſts in deducing and applying a rule coming from God, it may be juſtly called *divine juriſprudence.*

Sect. XIII.

The law of nature may be divided into preceptive and permiſſive.

Since the law of nature is a ſyſtem of laws (§ 12) whatever properly belongs to laws may be aſcribed to the law of nature, as to prohibit, permit, puniſh *. It may be divided as a body of laws is by the *Roman* lawyers into the permiſſive part, which obliges all men not to diſturb any perſon in the uſe and exerciſe of his right and liberty; and the preceptive, which obliges all men to do good actions, and to abſtain from bad ones; and it is alſo evident, that with reſpect to the preceptive part, there is no liberty left to mankind; whereas, with regard to the permiſſive, any one may renounce his right to what is permitted to him *.

* The permiſſive part of the law of nature conſtitutes therefore a rule: The preceptive makes an exception. For God leaves all to human liberty, which he hath neither commanded nor forbid. Thus, *e. g.* God having only prohibited our firſt parents the tree of knowledge of good and evil, they had good reaſon to infer that they were permitted to eat of all the other fruits, Gen. iii. 2, 3. Where no obligation of law takes place, there liberty is entire. But hence it muſt not be concluded, that a permiſſive law carries no obligation with it. For it obliges all mankind not to diſturb any one in the uſe of his liberty. Thus, *e. g.* becauſe God has permitted every one to appropriate to his uſe whatever is not yet appropriated by any perſon, or belongs to none, and thus to conſtitute dominion and property, theft, rapine, fraud, depredation, &c. cannot but be unlawful and unjuſt.

Sect. XIV.

Whether would there be a law of nature if there were no God?

Now ſeeing the law of nature comes from God (§ 12) as the ſupreme legiſlator, it follows by conſequence, that tho' a perſon may do a good action, without any regard to the law of nature as ſuch, being excited to it by the internal goodneſs or obligation of the action, and by his good diſpoſition; tho' even an atheiſt, who hath no ſenſe of religion, may do a good action thro' the influence and guidance of his reaſon, becauſe he knows it to be good in itſelf, and advantageous to him; yet ſuch a perſon cannot on that account be ſaid to act *juſtly*, *i. e.* conformably to the law of nature conſidered as ſuch; much leſs then can it be ſaid, that there would ſtill be a law of nature *, tho' it ſhould be granted, which cannot be done without impiety, that there were no God, or that God did not take any care of human affairs. See *Grotius* proleg. jur. belli & pacis, § xi.

* They cut the nerves, ſo to ſpeak, of the law of nature, who conceive or define it independently of all regard to God, and thus feign a law to themſelves without a lawgiver. All who have philoſophized about it with accuracy as well as religiouſly, have acknowledged, that it proceeds from God as its founder and author, and that if the divine exiſtence be denied, there remains no difference between juſt and unjuſt. God, in order to incite Abraham to the love and practice of juſtice, ſays to him, " I am the Almighty God, walk before me, and be thou perfect, *Gen.* xvii. 1. And the Apoſtle, *Heb.* xi. 6. ſays, " He that cometh to God muſt believe that he is, and that he is a rewarder of them that diligently ſeek him." Yea Cicero, de Nat. Deorum, l. 2. ſays, " I don't know whether piety towards God being removed, all ſociality and fidelity among men, and juſtice, the moſt excellent of virtues, would not likewiſe be deſtroyed."

Sect. XV.

Why it is ſaid to be inſcribed on our hearts.

Since the rule of rectitude we are now ſpeaking of ſignifies laws promulgated by right reaſon,

(§ 12) and reaſon is nothing elſe but the faculty of reaſoning, or of inferring one truth from others by neceſſary conſequence *, it is therefore plain why the apoſtle affirms that the knowledge of this rule is *engraved on our hearts*, Rom. ii. 15. For he attributes to man the power or faculty of reaſoning concerning juſt and unjuſt; which power, ſince it does not neceſſarily include in it actual exerciſe, why ſome ſhould aſcribe even to infants a certain innate ſenſe of juſt and unjuſt, is not difficult to be comprehended.

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* Grotius inſiſts much on the emphaſis of this phraſe, Grot. upon the Epiſtle to the *Romans*, ii. 15. and Joan. Clericus Art. Crit. part. 2. ſect. 1. cap. 4. §. 10. who maintain that it means no more than that the law of nature may be eaſily diſcovered and retained without the aſſiſtance of a teacher, and they have accumulated ſeveral paſſages of ancient authors in which ἐγγράφειν ſignifies nothing elſe. But this ſubject has been fully treated by Jo. Franc. Bud. Inſt. Theo. mor. part. 2. c. 2. § 5. where he has alſo examined Mr. Locke's opinion with great accuracy.

Sect. XVI.

Whether the knowledge of it is derived from the ſacred writings or tradition?

Hence it follows that the law of nature is not derived from the ſacred writings, nor from any divine poſitive laws, ſuch as the ſeven precepts given to *Noah*, of which the *Jews* boaſt ſo much *; tho' at the ſame time we readily grant, that the author of reaſon and revelation being the ſame, not only many things which reaſon dictates are to be found in the ſacred writings, but there is every where a perfect harmony between them; nor can there indeed be any thing forbidden or commanded in the ſacred oracles which is repugnant to the rule of right diſcoverable by reaſon.

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* How the Hebrews derive the law of nature and nations from the ſeven precepts given to Noah, is ſhewn by Jo. Selden, de jure nat. & gent. ſecundum diſcipl. Hebræorum. But tho' the learned Budæus Introd. ad philoſoph.

Heb. p. 14. and 15, thinks that tradition concerning the ſeven precepts given to Noah, does not want ſome foundation; yet it cannot be now proved, that ever any ſuch precepts were given to Noah, and tho' ſome things that were commanded or forbidden by theſe precepts be now known to the poſterity of Noah; they are known to them not by tradition but by reaſon, and therefore they are not poſitive laws, but laws promulgated by right reaſon.

Sect. XVII.

The law of nature is immutable.

Further, from the ſame principle it is evident that the law of nature is no leſs immutable than right reaſon it ſelf, which cannot but remain unchangeably the ſame: and therefore God, who cannot do any thing contrary to his will, cannot give any indulgence repugnant to that eternal law in any reſpect; and much leſs can any among mortals arrogate to himſelf any power over that law *.

* *Cicero* ſays elegantly, The law of nature cannot be altered, nothing can be derogated from it, much leſs can it be totally abrogated. We cannot be diſcharged from it by the ſenate or by the people; neither are we to look out for any explainer or interpreter of this law, beſides reaſon itſelf. There is not one law of equity for *Rome*, another for *Athens*; one for former and another for preſent times, but the ſame law binds all nations at all times. All men have one common univerſal Lord, Ruler, and Lawgiver, God the founder, the eſtabliſher of reaſon, and the judge of all reaſonable Beings. To this *Ulpian* conſents as we have ſhewn elſewhere. *L. 6. pr. D. de juſt. & jure.*

Sect. XVIII.

The difference between the law of nature and civil law.

Nor will it now be difficult to find out the difference between the law of nature and civil law. For the former is diſcovered by right reaſon, the latter is promulgated and made known either *viva voce* or by writing. The former extends as far as right reaſon: the other is the law of a particular ſtate: The former hath for its object all actions internal as well as external, which are by nature good or evil; The other reſpects indifferent and external actions, ſo far only as the good of any people or ſtate requires their regulation and adjuſtment *.

Sect. XIX.

The knowledge of it is of great utility with reſpect to civil law.

But notwithſtanding this difference, it is beyond all doubt, that the knowledge of the law of nature muſt be of the greateſt uſe to all who apply themſelves to the ſtudy of the civil law; becauſe many of its precepts are adopted by civil law, and by it are fortified with additional penalties *; ſeveral concluſions are drawn from the law of nature by civil law; and natural equity muſt never be ſevered from civil law, leſt according to the ancient ſaying, *Strict law become ſevere injuſtice.* Summum jus ſumma injuria.

Sect.

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* *Cicero de Invent. l.* 38. "All laws ought to be referred to the publick intereſt of the ſtate, and to be interpreted not according to the letter, but as the end of laws, publick good, requires. Such was the wiſdom and virtue of our anceſtors, that they propoſed no other end to themſelves in making laws but the ſafety and happineſs of the ſtate: they either never enacted into laws what was hurtful, or if they happened to do ſo, ſuch a law was no ſooner known to be hurtful than it was aboliſhed. No perſon deſires the obſervation of laws for their own ſake, but for the good of the republick." They are therefore much miſtaken who will have what they call *natural law* to be founded merely on intereſt, according to that ſaying of *Epicurus*,

Non natura poteſt juſto ſecernere iniquum,
Sola eſt utilitas juſti prope mater & æqui. Hor. Ser. l. 3.

It is true God being infinitely wiſe and good commands nothing by the law of nature, but what is uſeful; but he does not command it becauſe it is uſeful, but becauſe it is agreeable to his nature and will. An action is not juſt becauſe it is advantageous, but it is advantageous becauſe it is juſt. For, as was nobly ſaid by *Mar. Ant. Imp. l.* 7. 74. "Every action agreeable to nature is advantage or intereſt." But this error hath been ſufficiently refuted by *Grotius, Prolog. jur. bell. & pac.* § 16. *Puffendorff de jur. nat. & gent. L.* 2, 3, 10, 11. and the illuſtrious *Sam. de Coccei, de princip. jur. nat. & gent.* § 2, 9.

Sect. XX.

The brutes are not governed by the law of nature.

Moreover from the ſame principle it is viſible, that no other creatures beſides men are ſubject to this law; ſince God hath dignified man alone with the prerogative of reaſon; and therefore that definition of *Ulpian* is falſe. Natural law is a law which nature hath taught all animals. *L.* 1. § 3. *Dig. de juſt. & jure* *.

* This is obſerved by *Heſiod* in that celebrated paſſage of his book, *Oper. & Dier.* v. 274. Τόνδε γαρ, &c. The meaning of which is, Brute animals devour one another, becauſe they have no idea of juſtice, but to men nature hath given a ſenſe of juſtice, which far exalts them above the brute creation. *Jac. Cujacius* hath not removed the difficulty in his notes *ad Inſt. p.*8. *tom.* 1. by ſaying, "What "the brutes do by a natural impulſe, if men do the ſame "by reaſon, they act according to the law of nations." For thus an action will not be agreeable to the law of nature and nations merely becauſe brute animals do the ſame, but becauſe it is acting by the direction of right reaſon.

Sect. XXI.

What is called the law of nations?

Further, ſince the law of nature comprehends all the laws promulgated to mankind by right reaſon; and men may be conſidered either as particulars ſingly, or as they are united in certain political bodies or ſocieties; we call that *law*, by which the actions of particulars ought to be governed, *the law of nature*, and we call that *the law of nations*, which determines what is juſt and unjuſt in ſociety or between ſocieties. And therefore the precepts, the laws of both are the ſame; nay, the *law of nations* is the law of nature it ſelf, reſpecting or applied to ſocial life and the affairs of ſocieties and independent ſtates *.

* The law of nature is therefore of a larger extent than the law of nations; for there is nothing dictated or preſcribed by right reaſon, to which every particular is not

obliged in ſome manner to conform himſelf. But there are certain parts of the law of nature, which cannot ſo properly be applied to whole ſocieties, *e. g.* The laws and rights belonging to matrimony, paternal power, *&c.*

Sect. XXII.

Whether it be different from the law of nature?

Hence we may infer, that the law of nature doth not differ from the law of nations, neither in reſpect of its foundation and firſt principles, nor of its rules, but ſolely with regard to its object. Wherefore their opinion is groundleſs, who ſpeak of, I know not what, law of nations diſtinct from the law of nature. The poſitive or ſecondary law of nations deviſed by certain ancients, does not properly belong to that law of nations we are now to treat of, becauſe it is neither eſtabliſhed by God, nor promulgated by right reaſon; it is neither common to all mankind nor unchangeable *.

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* Many things which are referred to the poſitive law of nations, ariſe either from the law of nature itſelf, or from cuſtoms, or from ſome certain law common to many nations. Thus the rights of ambaſſadors, for the greater part, are deducible from the law of nature. Many things were obſerved among the *Greeks*, which barbarous nations payed no regard to, *v. g.* giving a truce to the vanquiſhed to carry off their killed. The manners and cuſtoms of the *Germans* became afterwards common almoſt to all nations, as *Grotius* has obſerved, *de jure belli & pacis*, 2. 8. 1. 2. In fine, even among chriſtian cuſtoms, ſome have ſo far fallen into deſuetude, that there is no remaining veſtige of them. *Leibnitz*, *præfat. Cod. jure gent. dipl. p.* 8. who obſerves, that many things eſtabliſhed by the pope of *Rome* as head of the chriſtian ſtate, are held for the common law of chriſtian nations. This *Hertius* & *Puffend. de jure nat. & gentium, l.* 2. *c.* 3. § 23. illuſtrates by an example, from the uſe of croſs-bows againſt chriſtians.

Sect. XXIII.

This work divided into two parts.

It will not therefore be an uſeleſs attempt to treat of both theſe laws, which have the ſame foundation in the ſame work, in ſuch a manner however, as carefully to diſtinguiſh the one from the other, ſince they differ from one another in reſpect of their objects and application. We ſhall therefore handle them ſeparately in this order; in the firſt book, we ſhall enquire into the law of nature; and in the ſecond, into the law of nations.

REMARKS on this chapter.

Tho' our Author proceeds more diſtinctly and methodically than moſt other writers on the law of nature and nations, yet ſome ſteps of the reaſoning of this chapter do not intirely ſatisfy me. For § 8. he reaſons thus, " A rule carrying along with it no more than *internal obligation* would be uncertain, and ſo would not deſerve the name of a rule; becauſe internal obligation only means the intrinſic goodneſs of an action, but man is ſo framed that he may miſtake ſeeming for real good."— Whence he concludes § 9. " That no rule can be certain, and thus ſufficient for our direction, but that which carries along with it " an external obligation, *i. e.* according to his definition, the " command of a ſuperior inveſted with ſufficient power to enforce " his commands." Now it is plain, that the command of God to do, or to forbear an action can only be inferred from the intrinſic goodneſs or pravity of that action, *i. e.* in our author's language, the external obligation of an action can only be inferred from its internal obligation. Our author acknowledges this § 5, and afterwards § 60, and § 77, & *ſeq.* But this being true, it evidently follows, That we cannot be more certain about the external obligation of an action, than we are about its internal obligation: whatever uncertainty our apprehenſions of the latter are liable to, our apprehenſions of the former muſt be liable to the ſame uncertainty. It appears to me very odd reaſoning to ſay, That conſidering how obnoxious men are to miſtakes about good and evil, there muſt be a more certain rule for human conduct than the intrinſic goodneſs of actions, even the divine will; when at the ſame time we are told, that we cannot come at the knowledge of the divine will with reſpect to our conduct, otherwiſe than by firſt knowing what an action is in itſelf; or that we can only infer the divine will concerning an action from its intrinſic nature, its intrinſic goodneſs or pravity. In order to cut off many verbal diſputes, with which the moral ſcience hath been hitherto perplexed in its very firſt ſteps, it ought in my opinion to ſet out in this manner. 1. If there be ſuch a thing as good or evil belonging to, or ariſing from actions, there is an internal obligation or a ſufficient reaſon to chooſe the one and to abhor the other. But that ſome actions are good and others evil, muſt be true if preſervation and deſtruction, pain and pleaſure, happineſs and miſery, perfection and imperfection, be not words without meaning, which will not be ſaid. This is the ſubſtance of what our author ſays in his firſt ſection, and thus the better antients deduced and explained the eſſential differences of actions, or the natural difference betwixt virtue and vice. See my *Principles of moral and chriſtian philoſophy*, T. 1. c. 5. t. 2 § 3. introduction. In other words, if there be any ſuch thing as natural good and evil, there muſt be moral good and evil; for actions tending to good muſt be good, and actions tending to evil muſt be evil; or if there be any ſuch thing as perfection and imperfection with reſpect to any quality, any being, as a vine, a horſe, *&c.* there muſt likewiſe be ſuch a thing as perfection and imperfection with reſpect to moral powers and moral agents and their acts or exertions. 2. If there be a God, he muſt will that we ſhould regulate our actions by, and act conformably to the internal obligation of actions. But that there is a God is the univerſal plain language of nature. 3. Wherefore wherever there is internal obligation to act in ſuch or ſuch a manner, there is likewiſe an external obligation to act in the ſame manner, *i. e.* there is an extrinſic reaſon for acting ſo, ariſing from the will of God, who is infinitely perfect, and upon whom all our intereſts here and hereafter abſolutely depend. 4. Whatever therefore in reſpect of its internal obligation may be called a proper rule of conduct, is at the ſame time a *law*, in the proper and ſtrict ſenſe of the word, *i. e.* it is the will, the command of a ſuperior who hath right to command, and power to enforce the obedience of his commands, being the will of God the creator. 5. A ſyſtem of rules or of directions for our conduct, having internal obligation, may be properly called a ſyſtem of laws, of natural laws, of divine laws, becauſe it is a ſyſtem of precepts diſcoverable from their natural fitneſs, or internal obligation to be the will or laws of God concerning our conduct. And therefore the whole enquiry into rules of moral conduct, may be called an enquiry into the natural laws of God concerning our conduct.

It is not properly the buſineſs of ſuch an enquiry to prove the being of a God, and that where there is internal obligation to an action, there muſt alſo be external obligation to it. It ſuppoſes that done, and proceeds to enquire into internal obligations; or to unfold the goodneſs and pravity of actions, and from hence to deduce general rules or laws of conduct. Now if the preceding propoſitions be attended to, and the difference between a rule and a law, or between internal and external obligation, according to our author's definition, be kept in mind; it may be aſſerted without any ambiguity, that abſtractly from all conſideration of the will of the ſupreme Being, there is no law for our conduct; there is a rule, but that rule is not a law, in the ſtrict ſenſe of that word. It would have prevented much jangling about the foundations of morality, if writers had carefully diſtinguiſhed, with a late excellent writer, *Dr. Sykes*, in his

Eſſay on the Connexion of Natural with Revealed Religion, between the law and the ſanction of the law. cap. 2.

Our author's reaſoning will proceed very clearly, if we underſtand the meaning of his 8 § to be to this purpoſe. "A rule of conduct while it is merely apprehended under the notion of reaſonable, will not be ſufficient to influence men; in order to have due influence upon them, it muſt be conſidered as having external, as well as internal obligation, ariſing from the will of God which never changes." See how Puffendorf reaſons, b. 2. of the law of nature and nations, ch. 3. § 20. "But to make theſe "dictates of reaſon obtain the dignity and power of laws, it is "neceſſary to call into our conſideration a much higher principle, &c."

With reſpect to what is ſaid, § 22. of the law of nations, 'tis well worth while to add an excellent remark of the author of the *Perſian Letters*, 94 and 95. "As the law of nature and nations "is commonly doctored, one would imagine there were two "ſorts of juſtice; one to regulate the affairs of private perſons, "which prevails in the civil law; the other to compoſe the "differences that ariſe between people and people, which plays "the tyrant in the law of nations: as if the law of nations were "not itſelf a civil law, not indeed of a particular country, but "of the world. The magiſtrate ought to do juſtice between "citizen and citizen; every nation ought to do the ſame between themſelves and another nation. This ſecond diſtribution of juſtice, requires no maxims but what are uſed in the "firſt. Between nation and nation, there is ſeldom any want "of a third to be umpire; becauſe the grounds of diſpute are "almoſt always clear and eaſy to be determined. The intereſts "of two nations are generally ſo far ſeparated, that it requires "nothing but to be a lover of juſtice to find it out: it is not "the ſame with regard to the differences that ariſe between private perſons as they live in ſociety, their intereſts are ſo mingled and confounded, and there are ſo many different ſorts of "them, that it is neceſſary for a third perſon to untangle what "the covetouſneſs of the parties ſtrives to tie knots in, &c."

CHAP. II.

Concerning the nature and diſtinguiſhing qualities or characteriſtics of human actions.

Sect. XXIV.

Tranſition to treat of human actions.

FROM what hath been ſaid of the foundation and origine of the law of nature and nations, it is obvious, that it hath for its object and ſcope the direction of human conduct; and therefore order makes it neceſſary to enquire accurately into the qualities and characteriſtics of human actions.

Sect. XXV.

What is meant by action and what by paſſion? What by external and what by internal action?

Experience, the fountain of all knowledge, teaches us, that various motions and changes happen in the human mind; but ſince no motion can be produced or conceived without a ſufficient moving cauſe, the motions which happen in the mind of man muſt have ſome ſufficient cauſe, which muſt either be *within* or *without* man. And therefore motions, the ſufficient cauſe of which is in man himſelf, are called *actions*; and thoſe the cauſe of which muſt be ſought after without man, are termed *paſſions*. But becauſe the motion called *action*, either produces nothing without the mind, but reſts there, or produces by will ſome effect in the body, the former are denominated *internal*, the latter *external actions*.

Sect. XXVI.

Paſſions of what kinds are they?

Paſſions not proceeding from us, but from ſome external cauſe, are ſo far without our power, and therefore are not unfrequently excited in us againſt our will or inclination; yet they may ſometimes be as it were repulſed and prevented, if we are provided with ſufficient force to reſiſt the external exciting cauſe; and on the other hand, in certain circumſtances we can aſſiſt the external mover, ſo as that the motion it tends to produce may be more eaſily excited in us. Whence it follows that ſome paſſions are within our power, and others are not *.

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* All this may be illuſtrated by clear examples. To be warmed is a paſſion; ſometimes we cannot avoid it, as when we are making a journey in very warm air: ſometimes we can, as when in winter we remove farther from the fire: and ſometimes we can as it were aſſiſt the cauſe,

as by drawing nearer to a fire that we may become warmer. To be warmed is therefore ſometimes in our power, and ſometimes without our power.

Sect. XXVII.

Whether they are ſubject to our direction or not?

Becauſe the law of nature hath only free actions for its object, (§ 4.) it cannot have for its object, in order to be directed by it, paſſions which are not within our power. Tho' it may lay down ſome rules relative to our paſſions, ſo far as they are in our power, yet, properly ſpeaking, theſe rules are not directions to our paſſions, but to thoſe free actions, by which we can reſiſt or aſſiſt theſe paſſions, ſhewing what we ought to do with regard to hindering or forwarding them *.

* Thus laws cannot be preſcribed to the paſſion of anger, but reaſon can give rules to our free actions, and directs us not to give looſe reins to anger, but to reſiſt its firſt motions, leaſt it ſhould become impetuous and ungovernable, and to forbear acting while the mind is in too great a ferment and perturbation, &c. Who will deny that he acts contrary to the law of reaſon who does not obſerve theſe rules? Nothing can be more true than what Cicero ſays, Tuſc. qu. l. 3. "All the diſeaſes and diſturbances of the mind proceed from the neglect or deſpight of reaſon, i. e. from not obſerving thoſe preſcriptions which reaſon dictates to us for hindering the mind from being overpowered by violent commotions."

Sect. XXVIII.

Whether the law of nature extends to them?

The law of nature therefore only extends to our actions; but let it be obſerved, that tho' the ſufficient cauſe of all theſe be in man himſelf, (§ 25.) yet experience teaches us, that of ſome actions we are conſcious and are abſolute maſters; others are of ſuch a nature that they proceed from ſome mechanical diſpoſition, in ſuch a manner that we are not always conſcious of them, nor have them ~~not~~ wholly in our power *.

* Thus it is in our power to ſit, ſtand, or walk; to be ſilent or ſpeak, to give or not give, &c. as we will. And of all theſe actions we are conſcious when we perform them; but, on the other hand, the playing of the lungs, the periſtaltic motion of the inteſtines, the circulation of the blood, &c. do not depend on us; they are motions which we often neither feel nor know to be performed in us. The Stoicks uſe that diſtinction ſomewhat differently when they aſſert that ſome things are τὰ ἐφ' ἡμῖν, within our power; and others are τὰ ȣ̓κ ἐφ' ἡμῖν, without our power. To the former claſs they refer opinion, appetite, deſire, averſion, in one word, all our actions; to the other they refer bodily goods, poſſeſſions, glory, power, and whatever in fine is not our own acquiſition or work. Epict. Enchirid. c. 1. Their diviſion is therefore a diſtribution of things, and not of actions only.

Sect. XXIX.

Actions are either human or natural. Whether the latter are the object of the law of nature?

Actions of which we are conſcious, and which are within our power, and ſubject to our direction, are properly termed *human* or *moral* actions; thoſe of which we are not conſcious, or not maſters, are called *phyſical* or *natural* actions; whence it is plain, that the former are *free*, the latter *neceſſary*; and therefore that *human* or *moral* actions alone can be directed by the law of nature (§ 4.), and not natural ones, except ſo far as it is in our power to aſſiſt and promote, or contrariwiſe to avoid and prevent them *.

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* Tho', as we have juſt now obſerved, we have no command over the circulation of our blood, the motion of the heart, &c. yet it is plain from experience that we can aſſiſt thoſe motions by temperance and medicines; and that we can diſturb them by intemperance, or put a period to them by poiſon, the ſword, and other methods. Who therefore can doubt, but the law of nature may prohibit whatever tends to diſturb or deſtroy theſe natural motions, and with them life itſelf? The ancient philoſophers have agreed to this truth. For tho' ſome have commended ſelf-murder as noble and heroic; yet *Democritus* elegantly ſays in *Plutarch de ſanitate tuenda*, p. 135. "If the body ſhould

"bring an action of damage againſt the ſoul, for an injury "done to it, it could not eſcape condemnation."

Sect. XXX.

The underſtanding and will are the principles of human actions.

Human or moral actions being free or within our power, and every thing being in our power which is directed by our will; it follows that human or moral actions are actions which may be directed by our will. But becauſe the will never determines itſelf, unleſs it be excited to deſire or reject by the underſtanding *; hence it is juſtly concluded, that the underſtanding likewiſe concurs in the exertion of free human actions; and therefore there are two principles of free human or moral actions: the *underſtanding* and the *will.*

* The will hath good or evil for its object, and therefore it always tends towards good, and flies from evil. Whence it is plain, it cannot chooſe but what is repreſented to it by the underſtanding, under the appearance of good, juſt, or advantageous; nor reject but what is exhibited to it under the ſemblance of evil, unjuſt, or hurtful. So Simplicius upon Epictetus, cap. 1. "But it is certain "that the acts of the willing power, are preceded by ſome "judgment or opinion. If an object be repreſented to the "mind as good or evil, propenſity or averſion are excited, "and appetite or deſire ſucceeds. For before we deſire any "agreeable object and embrace it, or fly from any thing "contrary to what is deſirable, the mind muſt neceſſarily be previouſly prone or averſe towards it."

Sect. XXXI.

What the underſtanding is?

Underſtanding is the faculty by which the mind perceives, judges, and reaſons. When this faculty takes the name of *imagination*, we have ſufficiently ſhewn in another treatiſe. (*in the elements of rational philoſophy.*)

Sect. XXXII.

Without its concurrence an action is not moral.

But ſince the will cannot exert itſelf, unleſs it be excited by the underſtanding, (§ 30.) it follows that it cannot prefer a juſt action as ſuch, nor abhor an unjuſt one as ſuch, unleſs the underſtanding hath firſt diſtinctly perceived the action to be juſt or unjuſt, by comparing it with the rule of action, i. e. by reaſoning. And therefore moral actions preſuppoſe the capacity of perceiving a rule of action, and of comparing actions with the ideas of juſt and unjuſt *.

Sect. XXXIII.

Hence conſcience.

That faculty by which we reaſon about the goodneſs or pravity of our actions is called *conſcience*, concerning which we have diſcourſed at large in another treatiſe. Here however it is neceſſary to repeat, or rather add ſome obſervations upon conſcience.

Sect. XXXIV.

Which is reaſoning.

Becauſe conſcience reaſons concerning the goodneſs and pravity of actions; (§33) but actions are called juſt, in reſpect of an external obligation ariſing from a law; conſcience muſt therefore compare the one with the other, the law and the fact; that is, form two propoſitions, and from them deduce a third; which, ſince it cannot be done but by ſyllogiſm, it follows that every reaſoning of conſcience is a ſyllogiſm, conſiſting of three propoſitions, the law, the action, and the concluſion.

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* Hence it is manifeſt that the law of nature does not extend to infants incapable of diſcerning good from evil; much leſs to the actions of mad perſons, changelings, or ſuch as are diſordered in their judgments by any diſeaſe; becauſe ſuch cannot reaſon about juſt and unjuſt. Ariſtotle therefore juſtly obſerves, Ethic. c. 34. "With reſpect to "things of which ignorance is the cauſe, man is not un- "juſt. For in the caſe of inevitable ignorance, one is as an "infant that beats its father without knowing what it does. "On account of this natural ignorance children are not "reckoned unjuſt. Whenever ignorance is the cauſe of "acting, and one is not the cauſe of his ignorance, men "are not to be deemed culpable or unjuſt."

* Such was that reaſoning of Judas's conſcience, Mat. xxvii. 4. "I have ſinned in that I betrayed innocent blood." In which the firſt propoſition expreſſes a law, the ſecond Judas's action, and the laſt the concluſion or ſentence of his conſcience. Nor does any thing elſe paſs in our mind when conſcience reaſons within us. It is therefore moſt wickedly miſrepreſented by Toland and others, as an empty name, made a bug-bear by prieſts.

Sect. XXXV.

It is divided into good and evil conſcience.

Since conſcience in its reaſonings always terminates in a ſentence which it draws (§ 34): but every ſentence either condemns or abſolves according as the action is found to be conformable or diſagreeable to the law. Conſcience, when it abſolves, is called *good*, and when it condemns, it is called *evil*; the former is attended with tranquillity and confidence; the latter with ſuſpiciouſneſs and dread.

* Hence St. Paul, *Rom.* ii. 15. calls the acts of conſcience λογισμȣ̀ς, &c. thoughts excuſing or accuſing; and St. John, 1 Ep. iii. 21. ſays, if our hearts condemn us not, then have we confidence towards God, *&c.* So ſpeak the Poets likewiſe,

Prima hæc eſt ultio, quod, ſe
Judice, nemo nocens abſolvitur : improba quamvis
Gratia fallaci Prætoris vicerit urna.

Juv. Sat. 13.

Sect. XXXVI.

It is likewiſe divided into antecedent and conſequent.

We may reaſon either about paſt or future actions, and therefore conſcience reaſoning about actions not yet performed, is called *antecedent conſcience*, and when it reaſons about actions already done, it is called *conſequent conſcience.*

Sect. XXXVII.

In ſome perſons both are found.

In both caſes conſcience compares the action with the law. But becauſe the good and upright man, who hath a due ſenſe of virtue and duty alone ſets himſelf to conform his future actions to the divine law; ſuch only exerciſe antecedent conſcience. The conſequent exerts itſelf even in the breaſts of the moſt profligate.

* Virtue is always united with an earneſt indefatigable care to underſtand the divine law. The greater progreſs one has made in virtue, the more ardent is this deſire in his breaſt. And hence it is, that rightly diſpoſed minds are ſtrict inſpectors into the nature even of thoſe actions which appear trivial and indifferent to others; for which reaſon, their conſcience is ſaid to be tender and delicate. Plutarch ſays elegantly, de profectu virt. ſent. p. 85. "Let this likewiſe be added, if you pleaſe, as a mark of no ſmall moment, that he who is making proficiency in virtue, looks upon no ſin as venial, but carefully ſhuns and avoids every appearance of evil."

Sect. XXXVIII.

Conſcience either excites, admoniſhes, or reclaims.

Further, as often as we compare a future action with the law, we find it either to be commanded, forbidden, or permitted. In the firſt caſe conſcience excites us to perform the action. In the ſecond it reſtrains us from it. In the third, having wiſely examined all its circumſtances, it adviſes what ought to be done. Conſcience is therefore divided into exciting, reſtraining, and admoniſhing.

* Thus conſcience excited Moſes and Zippora to circumciſe their ſon, recalling to their mind the divine precept about circumciſion, *Exod.* iv. 24. Conſcience reſtrained David from perpetrating his intended murder of Nabal, ſetting before him the divine command, "Thou ſhalt not kill." 1 *Sam.* xxv. 32. Finally, conſcience admoniſhed St. Paul not to eat meat which he knew had been conſecrated to idols, and to give the ſame counſel to the Corinthians. For tho' he knew that chriſtians could not be defiled by meats and drinks; yet his conſcience adviſed him to act prudently, leſt he ſhould give offence to any one, 1 *Cor.* x. 28. and hence his golden maxim: "All

things are lawful to me, but all things are not expedient: all things are lawful, but all things edify not."

Sect. XXXIX.

Conſcience is either right or erroneous.

Moreover, becauſe conſcience is a reaſoning, the ſame things agree to it which are true of a ſyllogiſm; wherefore as reaſoning, ſo conſcience may be either *right* or *erroneous*; and as every reaſoning is either faulty in the *form* or in the *matter*, ſo conſcience errs, either becauſe the law, or becauſe the action is not rightly repreſented; or becauſe the rules of juſt reaſoning are not obſerved.

* To illuſtrate this by examples. The Jews erred in the *matter*, when they thought they could without ſin with-hold from their parents what was due to them, provided they devoted it to God. For the *major*, in their reaſoning, ſet forth a *falſe law*. "But ye ſay, whoſoever ſhall ſay to his father or his mother, it is a gift by whatſoever thou mighteſt be profited by me." *Mat.* xv. 5. So likewiſe Abimelech, when he imagined he could innocently take Sarah into his bed. For he made a falſe ſtate of the fact, imagining he was to lie with an unmarried woman, *Gen.* xx. 2. To conclude, the Phariſees erred in the *form*, when they inferred from the law relative to the ſabbath, this falſe concluſion, that no work of neceſſity and mercy was to be done on it. *Mat.* xii. 10.

Sect. XL.

It is either certain or probable.

Again, as in other reaſonings, ſo likewiſe in thoſe of conſcience chiefly, it happens that an argument is ſometimes taken from a certain principle, and ſometimes from an hypotheſis, a probable propoſition, but yet merely hypothetical. Hence conſcience is called *certain*, when it argues upon an indiſputable law; and *probable*, when it founds upon the probable opinion of others *. Now, becauſe there are various degrees of probability, conſcience muſt ſometimes be more, and ſometimes leſs probable.

* Probable conſcience muſt not therefore be oppoſed to right conſcience, becauſe probable conſcience may be right. But it may be falſe; for as in reaſoning we may be deceived by a ſpecious ſhew of certainty, and miſtake a *paralogiſm* for a demonſtration; ſo we are much more liable to have a falſe appearance of probability put upon us by *ſophiſms*: whence we ſee the ſlipperineſs of that doctrine maintained by certain modern caſuiſts concerning the ſufficiency of *probable conſcience*, to exculpate from ſin, of which ſee Lud. Montalt. Litt. ad provincial. Ep. 5. and Sam. Rachel. Diſſer. de *probabiliſmo*. For unleſs we admit a rule which is a mere *proteus* to be a good one: We cannot poſſibly imagine we have done our duty, if we take probable conſcience for our guide, which is neither always right, nor certain, nor conſtant (§ 5): eſpecially, ſince theſe doctors meaſure probability by the opinions of others; whereas the apoſtle forbids us to truſt to the judgment of others in matters of ſo great moment. "Let every man be fully perſuaded in his own mind." *Rom.* xiv. 5.

Sect. XLI.

What doubtful and ſcrupulous conſcience mean?

Becauſe what is probable may be true, or may be falſe (§ 40): therefore it happens that probable arguments preſent themſelves to us on both ſides of the queſtion; now in this caſe we think more deliberation is required, the affair being dubious; and conſcience is then ſaid to be *doubtful*; but if the perplexity we are in, and cannot get totally rid of, be of ſmaller conſequence, it is then called *ſcrupulous* *.

* That doubting of the mind, which ſuſpends it between two opinions, is not improperly called by the learned Wolfius *Scrupulus*: But our definition ſeems more agreeable to the primitive meaning of the word. For *Scrupulus* ſignifies a very ſmall pebble, which yet getting into the ſhoe creates no ſmall pain. So Servius explains it, ad Æn. 6. v. 236. Apuleius oppoſes (ſcrupulum) to a more perplexing anxiety which he commonly calls *lancea*. See Scip. Gent. ad Apuleii Apolog. p. 150.

Sect. XLII.

What free and leſs free conſcience mean?

Beſides, it may happen that the mind, precipitated into vice by impetuous appetites, and as it were enſlaved by evil habits, is not able to reaſon freely about actions; but is ſtrongly biaſſed towards the ſide of its paſſions; in which ſervile ſtate conſcience is not a free and impartial reaſoner. But the mind which hath delivered itſelf from ſuch miſerable bondage into a ſtate of liberty is free. This diſtinction is accurately explained by *Wolfius*'s *Ethic.* § 84.

* Hence that paradox of the Stoics: "Every wiſe man only is free: and every fool is a ſlave." Cicero. Parad. 5. He whoſe virtue hath reſcued him from ſlavery to vice, into a ſtate of freedom, deſpiſes and tramples upon every diſorderly paſſion, and ſays with great magnanimity: "I will not receive arbitrary commands: I will not put my neck under a yoke: I muſt know what is greateſt and nobleſt; what requires moſt ſtrength of mind: the vigour of the ſoul muſt not be relaxed: If I yield to pleaſure, I muſt ſuccumb to pain, to toil, to poverty. Nay, ambition and anger will claim the ſame power over me," Seneca. Ep. 51. Upon which place Lipſius ad Philoſ. Stoic. l. 3. Diſſer. 12. diſcourſes to this purpoſe: "Mark, ſays he, how many maſters he had already rid himſelf of? Add to theſe, luſt, avarice, and other vicious paſſions, and you will have a multitude of what may properly be called tyrants. How wretched is the ſlave who is in ſubjection to them! How free and great is he who hath put them under his feet? What liberty can we ſay remains to a conſcience which ſo many vitious diſorderly appetites and paſſions have fettered and enſhackled?"

Sect. XLIII.

What ſleeping, awakened and ſeared conſcience mean?

We know by experience that men are ſometimes lulled ſo faſt aſleep by their vices, that they have no feeling of their miſery, and never think upon duty, or right and wrong. Now, as we then ſay, conſcience is in a deep *lethargy*; or if it is, by a long habit of vice, become quite obdurate and callous, we ſay it is *ſeared* as with a burning iron *. So conſcience ſeems as it were to *awake*, when a perſon rouzed by calamity, or a ſenſe of danger, begins to examine and ponder his actions with ſome attention, and to reflect and reaſon about their goodneſs or depravity.

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* *Cauterio uſta*, an emphatical way of ſpeaking by St. Paul, 1 Tim. iv. 2. For as the finger, or any member of the body burnt with a hot iron loſes all ſenſibility; ſo the mind inured to a vitious courſe, does not feel its miſery which others behold with horror: the ſame apoſtle, Epheſ. iv. 19. calls ſuch perſons *paſt feeling*. See Beza's commentary on the place.

Sect. XLIV.

What is meant by quiet, diſturbed, anxious, diſquieted conſcience and remorſe?

We have already remarked that every one's conſcience condemns or abſolves him (§ 35): but becauſe abſolution muſt be accompanied with the higheſt ſatisfaction of mind, and condemnation with the bittereſt uneaſineſs and diſquiet; hence it follows, that a good conſcience, acting upon certain evidence, is for the moſt part quiet and eaſy; an evil conſcience is diſturbed by racking remorſe; (which torment the antients compared to the burning torches of the furies): and a dubious one is very anxious and reſtleſs, to ſuch a degree, that it knows not to what hand to turn itſelf. Theſe affections however belong more properly to the effects of conſcience than to conſcience itſelf, as every one will immediately perceive.

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* So Cicero pro Sex. Roſc. Amer. cap. 24. Now theſe remorſes of conſcience are an irrefragable argument againſt thoſe who abſurdly maintain, that the uneaſineſs of conſcience ariſes wholly from the fear of civil puniſhment, to which criminals are obnoxious. For in the firſt place, 'tis not private perſons only who are harraſſed day and night by theſe terrible furies; but even thoſe whom birth and grandeur have ſet above all liableneſs to puniſhment in this world, ſuch as a Nero, according to Sueton. cap. 34. And ſecondly, if any ſhould rather imagine he feared the

juſt reſentment of the people, there are not wanting examples of perſons who in their dying moments, when they could have nothing to fear from men, have been inexpreſſibly tortured by a ſecret conſciouſneſs of crimes unknown to the world: as Chilo Lacedemonius, who in Aulus Gell. Noct. Att. l. 3. thus ſpeaks, " I ſurely, ſaid he, at this moment do not deceive myſelf, when I think I have committed no crime the remembrance of which can create me any uneaſineſs, one only excepted, *&c.* And Sueton relates a ſaying of the emperor Titus to the ſame purport. Tit. cap. 10.

Sect. XLV.

Whether conſcience be the rule of human actions?

Whence we ſee what judgment we are to form of the opinion of thoſe who aſſert that conſcience is to be held for the internal rule of human actions. For if a rule cannot anſwer the end of a rule unleſs it be right, certain, and invariable (§5); who will admit conſcience to be a rule which is ſometimes erroneous (§ 39); ſometimes only probable (§40); ſome times doubtful and wavering; (§41) and frequently overpowered by perverſe appetites (§ 42); wherefore, tho' he be guilty who acts contrary to conſcience, whether certain or probable; yet he cannot for that reaſon be ſaid to act rightly and juſtly, who contends that he has acted according to his conſcience *.

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* Conſcience is not the rule, but it applies the rule to facts and caſes which occur; wherefore, it is ſafer to omit an action concerning the pravity of which we reckon ourſelves fully convinced, than it is to do an action which conſcience eſteems juſt and good, without being certain of the law. He then who follows an erroneous conſcience ſins on this very account, that he follows it rather than the will of the legiſlator: tho' he be more excuſable than one who acts directly againſt conſcience, yet he is guilty. For which reaſon, I cannot go along with the opinion of Limborch, who in his Chriſtian Theol. l. 5. c. 2. § 8. maintains, that even an erroneous conſcience muſt be obeyed.

Sect. XLVI.

Why action ought to be ſuſpended while conſcience doubts?

Hence we may conclude, that while conſcience is uncertain, and fluctuates between contrary opinions, action ought to be ſuſpended. This we aſſert in oppoſition to Ger. Gottl. Titus, in his obſervations on Puffendorf de off. hom. & civ. l. 1. c. 1. § 6. And for one to do any thing with ſuch an obſtinate obdurate mind, as to be very little concerned about knowing the divine will, and determined to do the ſame, even tho' he ſhould find it to be prohibited by God, is the heighth of perverſeneſs.

* To this purpoſe it is well ſaid by Cicero de Off. l. 9. " For this reaſon it is a good precept which forbids us to do any thing, of the goodneſs or iniquity of which we are in doubt. For honeſty quickly would ſhew itſelf by its own native brightneſs: and the doubting about it is a plain intimation that at leaſt we ſuſpect ſome injuſtice in it." *i. e.* He who ventures to do what he doubts whether it be honeſt or diſhoneſt, by ſo doing bewrays a propenſion to do an injury. Hence the apoſtle ſays, *Rom.* xiv. 23. " And he that doubteth is damned if he eat, becauſe he eateth not of faith, and whatſoever is not of faith is ſin."

Sect. XLVII.

The weakneſſes or defects of the underſtanding, ignorance and error.

From what hath been laid down, it is plain that *ignorance* and *error* are the great hinderances to conſcience in the application of a law to a fact. By the former is underſtood the mere want of knowledge; by the other is meant the diſagreement of an idea, a judgment, or a reaſoning to truth, or the nature of the thing. One therefore is ſaid to be ignorant who hath no idea before his mind; and one is ſaid to err, who hath either a falſe idea of the object, that is, an idea not conformable to it; an obſcure, confuſed, or unadequate idea. For an error in the idea muſt of neceſſity infuſe itſelf into the judgment made concerning an object, and from thence into all the reaſonings about it.

Sect. XLVIII.

Whether ignorance and error of all ſorts be culpable?

But becauſe all men are not under an obligation to find out the more abſtruſe truths which may be ſaid to lie at the bottom of a deep well; and in reality the ignorance of ſome things is rather attended with advantage than detriment *; (yea, as Terence obſerves, Hecyr. the ignorant and illiterate often do more good in one day, than ever the learned and knowing do;) hence it may be inferred, that ignorance and error of every kind is not evil and blameable.

* An example of this might be brought from the ignorance of certain crimes, which ought not ſo much as to be named; for there the maxim helds, *ignotorum nulla cupido*; what is unknown is undeſired. Who would not wiſh many were in a ſtate of ignorance, which would effectually ſhut out and render the mind quite inacceſſible to certain vile concupiſcences? Juſtin. Hiſt. 2. 2. ſays, "the Scythians were better through their ignorance of ſeveral vices than the Greeks were by their knowledge of virtue." Nor does Quintilian ſeem to have leſs admired the ancient Germans, when ſpeaking of a moſt enormous vice, he ſays "they were totally ignorant of it: their manner of living was more pure, *&c.*"

Sect. XLIX.

What kind of ignorance and what kind of error is culpable?

Yet ſince the will makes no election unleſs it be excited to it by the underſtanding; and therefore the underſtanding concurs in producing moral actions (§ 30), the conſequence from this is, that they are not blameleſs who are groſly ignorant of thoſe truths relative to good and ill, juſt and unjuſt, which it was in their power eaſily to underſtand, or who err with regard to theſe matters, when error might have been avoided by due care and attention to acquire right and true knowledge.

Sect. L.

Ignorance is either vincible

Hence ariſe various diviſions or claſſes of ignorance and error, ſo far as it is or is not in our power to eſcape ignorance, it is *vincible* or *invincible* *. So far as one is or is not the cauſe of it himſelf, it is *voluntary* or *involuntary*. Finally, if one does any thing he would not have done had his mind not been obſcured by ignorance, ſuch ignorance is called *efficacious* or *effectual*. But if he would have done the ſame action tho' he had not been in the ſtate of ignorance in which he did it, it is called *concomitant*. Repentance is the mark of the former; but the latter diſcovers itſelf by the approbation given to the action done in a ſtate of ignorance, when that ignorance no longer takes place. Now all this is equally applicable to error.

or invincible, voluntary or involuntary, efficacious or concomitant.

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* Ignorance and error are ſaid to be invincible, either in regard of their cauſe or in themſelves; or in both reſpects at the ſame time. Thus the ignorance of a drunken perſon is in itſelf invincible, ſo long as his madneſs continues; but not in reſpect of its cauſe, becauſe it was in his power not to have contracted that madneſs. On the other hand, the hurtful actions of mad men proceed from ignorance, which is invincible, both in itſelf and in regard of its cauſe, ſince they not only do not know what they are doing, but it was not in their power to have eſcaped their madneſs. All this is true, and hath its uſe in the doctrine of *imputation*: But the firſt cannot ſo properly be called invincible, ſince it might and would have been avoided, had not the mind been very regardleſs of duty. The matter is admirably explained by Ariſtotle in his books to Nicomachus, 3. 7. where ſpeaking of that law of Pittacus which inflicted a double puniſhment upon the crimes committed by drunken perſons, he immediately adds: "A double puniſhment is appointed for the crimes of drunken perſons; becauſe theſe actions are in their ſource from them. It was in their power not to get drunk. But drunkenneſs was the cauſe of their ignorance." Concerning this law of Pittacus ſee Diogenes Laertius, 1. 76. and Plutarch in Conviv. ſept. ſap. p. 155.

Sect. LI.

We proceed now to conſider the other principle of human or moral free actions, *viz*. the *will*, (§ 30) which

What will is?

is that faculty of our mind by which we chooſe and refuſe. Hence it is juſtly ſaid, that truth and falſhood are the objects of the underſtanding; but that the will is converſant about good and ill. For the will only deſires truth as it is good, and is averſe to falſhood only as it is ill *.

* Thus no wiſe man deſires to know his future calamities, becauſe it would only ſerve to anticipate his ſuffering. And therefore, however true his foreknowledge might be, it would not be good. Children, on the other hand, are very fond of fables, even tho' they know they are feigned, becauſe they perceive them to be fit leſſons for their inſtruction; or at leaſt very entertaining: and on theſe accounts, they look upon them as good.

Sect. LII.

Its nature and acts.

From this definition we may conclude that the will cannot chooſe any thing but what is exhibited to it by the underſtanding under the ſhew of good, nor turn aſide from any thing but what appears to it to be ill. The greater good or ill there ſeems to be in any thing, the ſtronger in proportion is our inclination or averſion; and therefore the deſire of a leſſer good or a leſſer evil may be overpowered by the repreſentation of a greater good or evil. Averſion does not conſiſt in a mere abſence of deſire, but hath ſomething poſitive in it, which is called by Koehler, exerc. jur. nat. § 167. *noluntas* vel *reclinatio*, *refuſing* or *averſion*.

* As the Civilians accurately diſtinguiſh between *non nolle & velle*, l. 3. D. de reg. Juris; ſo we ought to diſtinguiſh between *not willing*, and *not deſiring* and *refuſing*, or *having an averſion*. There are many things which a wiſe man does not chooſe or will, tho' he does not abhor them. Thus he does not deſire immortality on earth, becauſe nature hath not granted it; nor empire, becauſe fortune hath not allotted it to his birth: But he has no averſion to theſe things, but on the contrary pronounces them great and noble goods. He does not deſire what his rank puts beyond his power to attain, but he would not

diſlike it if he could obtain it. Thus *Abdolominus*, intent upon his daily employment, dreſſing and weeding his little garden, had no thoughts of royalty: he did not deſire it, yet he did not refuſe and deſpiſe it, when he was ſaluted king, and preſented with the royal robes and enſigns. Cur. de geſt. Alex. 4. 1.

Sect. LIII.

Its ſpontanity and liberty.

From the ſame definition it is clear that man, with regard to his will, acts not only *ſpontaneouſly* but *freely*. For *ſpontaniety* being the faculty of directing one's aim to a certain end, but liberty being the power of chooſing either of two poſſibles one pleaſes; it is plain from experience, that both theſe faculties belong to our minds. The ſervile ſubjection one is under to his perverſe appetites and affections till virtue makes him free, is not inconſiſtent with theſe properties. For theſe obſtacles are of ſuch a kind, as hath been obſerved, that they may be removed and overpowered by the repreſentation of a greater good or evil to the underſtanding (§ 52) *.

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* Thus, whatever propenſion a thief may have to ſteal, yet he would not yield to that wicked cupidity, could he ſet before his eyes the diſmal effects of his crimes, the horrors of a dungeon and ſhackles, and the ignominy of a gibbet. And thoſe who are moſt highly charmed with indolence and voluptuouſneſs, would quickly be inflamed with the love of a nobler life and more honourable purſuits, if, calling in reaſon to adviſe them, they could fully perceive the excellence of wiſdom, its agreeableneſs and manifold advantages on the one hand, and on the other ſide the irreparable ignominy and detriment which are inſeparable from ſloth and ignorance. Epictetus diſpatches the whole matter with great brevity. Arrian. l. 17. "Can any thing overcome an appetite? Another appetite can. Can any thing get the aſcendant of an inclination or propenſity? Yes really another can." And he illuſtrates it by the ſame example of a thief we have juſt now made uſe of.

Sect. LIV.

Do temperament or bodily conſtitution affect it?

Hence it is evident, that bodily conſtitution, (which philoſophers call *temperament*) does not infringe upon the liberty of human will. For tho' the mind be variouſly affected by the body, ſo as to be rendered by it more propenſe to certain vices; yet that propenſity hath no more of compulſion or force in it than there is in the inducement to walk out when fine weather invites one to it. But who can deny that the will is left intire, and not hindered or prevented from chooſing either to walk out or not as it ſhall appear moſt reaſonable, when inticed by all the charms of ſpring?

Sect. LV.

Whether affections and habits encroach upon it?

The ſame is true concerning all the affections and motions excited in the mind by the appearances of good and ill. For tho' the mind, with reſpect to the firſt impreſſion, be paſſive, every thing elſe is however intirely in its power; to reſiſt the firſt impulſe, not to approve it, nor to ſuffer it to gain too much force. And it likewiſe holds with regard to habits, *i. e.* propenſions confirmed by long uſe and practice. For tho' theſe gradually become ſo natural, that tho' expelled with never ſo much force, they recoil, Hor. ep. 1. 10. v. 24. (*ſi expellas furca, tamen uſque recurret*) yet they are not incorrigible, but may be amended, if one will but exert his liberty.

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[*] Habits are affections and propenſities become ſtrong by daily repetition or cuſtom. Now what has been contracted by practice may by diſuſe be aboliſhed and erazed, if we will but give as great pains to deſtroy it as we did to eſtabliſh it into ſtrength. There is an elegant paſſage to this effect in Ariſtophanes in Veſpiſ. thus tranſlated into Latin.

Uſus quo fueris diu,
Mutare ingenium, grave eſt.

Multos invenias tamen,
Qui mores moniti ſuos
Mutarunt melioribus.

Sect. LVI.

What may be ſaid of external force.

External violence is ſo far from taking away the liberty of the human mind, that it affords a ſtrong proof of our liberty. For tho' one may be hindered by force from doing what he chooſes to do; yet no force can make one will what he does not will, or not chooſe what he chooſes *. If the underſtanding repreſents the good attending an action as greater than the imminent evil, no external violence can force one to quit his reſolution, he will remain unſhaken by all the menaces of power or cruelty.

Nec civium ardor prava jubentium
Nec vultus inſtantis tyranni
Mente quatiet ſolida.

Sect. LVII.

The will is divided into conſequent and antecedent.

Hence we ſee that the diſtinction between *antecedent* and *conſequent will* ought not to be rejected; the former of which decides without a view of all the circumſtances which may happen at the time of acting; the other ſuits itſelf to the circumſtances which appear at that inſtant. The one therefore is not oppoſite to the other, tho' they be very different. Thus it is true that God loves peace, and yet that in certain circumſtances he does not diſapprove war.

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* This is likewiſe obſerved by Epictetus in Arrian, l. 1. 17. After he had aſſerted, that an appetite can only be overcome by another appetite, he adds: "But it may be ſaid, he who threatens me with death forces me. Truly the cauſe is not that which is threatened, but it is owing to your thinking it better to do the action than to run the riſk of dying: it is therefore your opinion which forces you, *i. e.* one appetite overcomes another."

Sect. LVIII.

Actions are ſpontaneous, forced, voluntary, and mixed.

Further, it is equally plain that thoſe actions are *ſpontaneous* which are performed by a mind determining itſelf to a certain known propoſed end; theſe are not ſpontaneous which do not proceed from ſuch a determination of the mind, but are done without intention. Again, even ſpontaneous actions are *voluntary*, to perform which no external neceſſity compels; and ſuch are *forced*, to which one is neceſſitated by ſome external urgent circumſtances. We need not add *mixed*, becauſe actions called ſuch, being performed under ſome external neceſſity urging to it, coincide with thoſe which are called forced actions *.

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* Thoſe are called by ſome mixed actions, which one does under an urgent neceſſity, ſo as that he would rather not do them. Such as that caſe deſcribed by Lucretius de rer. nat. l. 2. v. 277.

> *Jamne vides igitur, quamquam vis extima multos*
> *Pellit, & invitos cogit procedere ſæpe,*
> *Præcipiteſque rapit, tamen eſſe in pectore noſtro*
> *Quiddam, quod contra pugnare obſtareque poſſit?*

The ſame happens in every forced action. For no external violence can force us to will or not to will (§ 56.) and therefore there is no uſe for the diſtinction between compelled or forced and mixed actions.

Sect. LIX.

Actions not ſpontaneous are involuntary. Forced actions are voluntary.

Hence it is obvious that no action which is not ſpontaneous is voluntary (§ 58); but forced actions may be voluntary. For tho' we would rather not act were not a very great evil ſet before us, yet it is the will which determines to act; whence it follows, that the antient lawyers were in the right when they affirmed, that one who is forced, wills. D. l. 21. § 5. *quod met. cauſa.* "coactum etiam velle."

REMARKS

REMARKS on this Chapter.

Our Author doth not enter at all into the diſpute about neceſſity and free agency. It would have been a digreſſion from his ſubject. The queſtion is moſt accuratetly handled by Mr. Locke in the chapter of Power, in his Eſſay on human underſtanding. See likewiſe what I have ſaid of it in my Introduction to the principles of moral philoſophy; and in the Chriſtian philoſophy, ſect. 2. prop. 4. But I think the whole matter may be diſpatched in a few words. It is as much a matter of experience as any other whatever, That ſeveral things depend upon our will as to their exiſtence or non-exiſtence; as to ſit, or ſtand, or walk; to write or not write: to think or leave off thinking on this or the other ſubject, *&c.* But ſo far as it depends in this manner on our will, or pleaſure to do, or not to do, we are free, we have power, dominion, agency; or we are not paſſive but active beings. To ſay we are not free, but neceſſary, muſt be to aſſert either that we are not conſcious, which is contrary to experience; or that we never will, which is alſo contrary to experience; or that our will never is effective, which is equally ſo, ſince many things depend on our will: For neceſſity muſt mean one or other of theſe three, or all of them together. There is no other property included in the idea of a free agent; there is no other conceivable property belonging to action or agency, beſides willing with power to effect what is willed. To ſay that the will is not free, becauſe it muſt deſire good and hate ill as ſuch, is to ſay freedom or activity cannot belong to a mind endued with the power of willing; ſince willing means complacency in good, or preferring it, and averſion to evil, or deſire to avoid it, *i. e.* it is to ſay freedom means ſome property that can't exiſt, becauſe it implies a contradiction, *viz.* willing without willing. Freedom is the very idea of agency: it is that which conſtitutes an agent; and it ſignifies having a certain degree or extent of power, efficiency, or dominion by our will. And that we have a certain degree or extent of power, efficiency, or dominion by our will, is as manifeſt to experience as that we think: nor can a proof of it be demanded, unleſs at the ſame time a proof of thinking and conſciouſneſs be demanded.

As for what our Author ſays about erroneous conſcience, it will be better underſtood by what is ſaid in the fourth chapter about imputation, and our remark added to that chapter. Mean time we may obſerve, 1. That if to acquire knowledge for the direction of our actions be not among our τὰ ἐφ' ἡμῖν, or within our power, the direction of our actions cannot be in our power, that is, we are not agents. If we are not accountable for our not having knowledge ſufficient to direct our actions rightly, we cannot be accountable for our actions. 2. Our views, our judgments of things muſt be our rule; we can have no other: yet ultimately, the nature of things is the rule, becauſe the natures of things are ſtubborn, and will not yield to our miſapprehenſions of them. It is the ſame here as with regard to mechanicks, where no difficulty is ſtarted. The nature of mechanical powers and properties will not ſubmit to our notions; yet we muſt work in mechanical arts according to our apprehenſions of mechanical laws and properties. Our ideas and judgments are our immediate guide; but the natural qualities and relations of things are the ultimate ſtandard. The former may vary, but the latter are unchangeable. The ultimate meaſure of opinions, which is truth or nature, is conſtant, immutable.

CHAP. III.

Of the rule of human actions, and the true principle of the law of nature.

Sect. LX.

Of what nature or kind the rule of human action muſt be.

SUch, we have already ſeen, is the nature of our free actions, that they muſt have a rule to direct them (§ 4); there we likewiſe ſhewed that a rule could not ſerve the purpoſes of a rule, if it be not ſtreight or right, certain, evident, and invariable, and have external as well as internal obligation. Let us now enquire a little more accurately what this rule is which hath all theſe properties eſſential to a rule for human, free, moral actions.

* Let us not confound the rule of human actions with the principle of natural law. The former is what philoſophers call the (principium eſſendi) becauſe it conſtitutes the principle or ſource of obligation to us. By the latter we underſtand principium cognoſcendi, *i. e.* the principle, the truth or propoſition from which our obligation to any action appears or may be deduced. Theſe are different, even with regard to civil ſtates. For the ſource or principle of the obligation under which all the members of any ſtate whatſoever lie, is the will of the ſupreme authority in that ſtate, and that is alſo the rule to which every member of a ſtate is obliged to conform himſelf. But if it is asked whence or how that ſupreme will may be known, in every ſtate you will be referred to its laws; and therefore, theſe are likewiſe in every ſtate the ſole and adequate principle or ſource of knowledge with reſpect to civil duties and obligations.

Sect. LXI.

The rule of human actions muſt either be within us or without us. If it be within us, it can be none other but either our own will, or our underſtanding and conſcience. But neither of theſe faculties is always right, neither of them is always certain, neither of them is always the ſame and invariable; wherefore neither any of them, nor both of them together, can be the rule of human actions; whence it follows that the rule of human actions is not to be found in ourſelves; but if there be any ſuch, it muſt be without us.

The rule of human actions is not to be found in us, but without us.

Sect. LXII.

Now without us exiſt other created beings, and likewiſe a *God*, the author of all things which exiſt. But ſince we are enquiring after a rule of human actions, carrying with it an external obligation (§ 9) and made known or promulgated to all mankind by right reaſon (§ 11); and ſince external obligation conſiſts in the will of ſome being, whoſe authority we acknowledge (§ 9), there being no other whoſe authority we are obliged more ſtrictly to acknowledge than the infinitely perfect and bleſſed *God* (§ 10); and ſeeing he alone can promulgate any thing to us by right reaſon, of which he is the author, it follows, by neceſſary conſequence, that the *will of God* muſt be the rule of human actions, and the principle or ſource of all natural obligation, and of all virtue.

It is to be found in the will of God.

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* We therefore fall in with the opinion of the celebrated Sam. a Cocceis, who in his diſſertations already cited (§ 10) has demonſtrated this truth by ſolid arguments, and likewiſe defended it againſt objections and cenſures with great judgment and erudition, Diſſert. 1. qu. 2. § 6. & ſeq. where he has gathered together very many paſſages from ancient authors to prove this to have been the more general opinion of ancient moraliſts, the chief of whom are Xenophon, Sophocles and Cicero.

Sect. LXIII.

The will of God is a right, certain, and conſtant rule.

That this rule is *right* cannot be doubted, ſince an infinitely perfect Being cannot will what is not perfectly good and right: it muſt be a *certain* rule, ſince reaſon diſcovers it to all men; and it muſt be *unvariable*, becauſe the will of God can no more change, or be changed, than God himſelf, or right reaſon, by which it is diſcoverable. Finally, it muſt be *obligatory*, ſince God hath the juſteſt claim and title to our obedience; and men have no reaſon or right to decline his authority, and cannot indeed if they would. Hence at the ſame time it is evident, that every will of God is not the rule of human actions, but his obligatory will only *.

Sect. LXIV.

This rule may be called a law with regard to mankind.

Since therefore the *obligatory will of God*, which we have ſhewn to be the only rule of human actions, is his will with reſpect to the actions of his rational creatures, as to acting or forbearing to act (§63); it is evident, that this rule, conſidered with relation to man, may properly be called *a divine law*, becauſe it is the will of the ſupreme Being, commanding or forbidding certain actions with rewards and penalties (§ 9). But becauſe there are other laws of

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* The will of God is of a large extent, and its various diviſions are fully explained in treatiſes of natural theology; by none more accurately than by Ruardus Andala, Theolog. nat. part. 2. c. 8. § 6. & ſeq. and Wolfius Theolog. nat. part. 1. c. 3. It is ſufficient for us to obſerve, that God himſelf being the primary object of his will, as he loves, approves, and delights in his own perfections, and the whole univerſe, to which he gives being by his will, is upheld, governed and moved according to certain laws choſen and approved of by him, and is therefore the object of his will; wherefore here we underſtand by the divine will, the will of God relative to the actions of his intelligent creatures, either with reſpect to doing, or not doing: and this will we call *moral* or *obligatory*.

God to mankind which are made known by revelation, and are therefore called *poſitive*, thoſe which are known to man by natural reaſon, are juſtly denominated *natural*; and according as they either command, prohibit, or permit, they are with good reaſon divided into *affirmative*, *negative*, or *permiſſive*.

Sect. LXV.

The explication of the divine juſtice may be deduced from the divine will.

Now ſince this divine will, or divine natural law, is the ſource and principle of all juſtice (§ 63), it follows that every action, not only human, but divine, which is conformable to this divine will, is *juſt*; and therefore it is objected, without any reaſon, againſt this doctrine, that there could not be any ſuch thing as divine juſtice, were there no other principle or ſource of the law beſides the *divine will* *.

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* The author of the Obſervat. Hanover. ob. 8. objects againſt this doctrine of Sam. de Cocceis in this manner: "Other dangerous conſequences would likewiſe follow from this poſition, ſuch as have indeed been thrown out by ſome moſt raſhly and unwarily; as for inſtance, that there is no ſuch thing as divine juſtice. For if juſtice only means the command of the Creator, or of one who hath power to enforce his will; it is manifeſt that juſtice cannot belong or be aſcribed to God, ſince he cannot be forced or compelled; and therefore he may without any injuſtice damn an innocent perſon, and make the greateſt ſcelerate immortally happy. Upon which hypotheſis, the fear of God will indeed remain, but the love of him cannot take place." But ſince God wills nothing but what is right and juſt, why may not the divine juſtice be explained from the conſideration of his will? There is indeed, with reſpect to God, no command, no co-action, and therefore no external obligation: but the ſame holds true with regard to ſupreme authority in ſtates, in relation to the laws conſtituted by it. For tho' a prince who has ſupreme abſolute power be not ſtrictly ſpeaking bound by his own laws; yet we call him juſt, when he renders to every one conformably to his own laws. Why then may we not call God juſt, becauſe he renders to every man what is

due to him, according to his own will and law? Man therefore is denominated juſt, when he gives obedience to the will of God promulgated as a law. But God is juſt, becauſe he renders to every one his due without law, without co-action or external obligation. God cannot damn an innocent perſon, or make an abandoned ſcelerate happy. Becauſe by ſo doing, he would act not according to his own will, by which he wills nothing but what is juſt, equitable, and ſuitable to his own perfection.

Sect. LXVI.

The difference between the rule of divine and the rule of human juſtice, in what does it conſiſt?

Herein chiefly lies the difference between *divine* and *human* juſtice, that with regard to the former there is no law or co-action; whereas the latter includes in it a reſpect to a law, and external obligation or co-action (§ 65 & § 64). Wherefore the divine will, as it is a rule of action to men, carries with it a communication of ſome evil or puniſhment to tranſgreſſors; tho' that puniſhment be not, as in human laws, defined and aſcertained, but be, for the greater part, indefinite, and reſerved to God himſelf, to be inflicted according to his wiſdom and juſtice *.

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* Thoſe who call every ſuffering or evil which attends a bad action, or is connected with it, *puniſhment*, rightly divide *puniſhment* into *natural* and *poſitive*. So the learned Koehler. exercitat. jur. nat. § 362, & ſeq. But if by *puniſhment* be underſtood the ſuffering or evil which the law itſelf threatens againſt offenders, it is *poſitive puniſhment* only which properly falls under the name of *legal* or *authorative puniſhment*. *Natural puniſhment* is acknowledged even by atheiſts. *Poſitive puniſhment* thoſe only can acknowledge who believe the divine Being, and providence: Now, tho' particular *poſitive puniſhments* be not defined; yet right reaſon ſufficiently proves, that God cannot but render to mankind according to their actions, whether they be good or bad, ſuitable rewards and puniſhments. For that plainly and directly follows from the idea of the divine juſtice, and is admitted by all who do not call divine providence into doubt. Xenophon Memorab. Socrat. l. 4, 16. " Do you think the Gods would have impreſſed human minds with an opinion that

they can inflict puniſhments and beſtow rewards upon them, if they really could not do it; and if men being for ever deceived never felt any ſuch thing?"

Sect. LXVII.

That we may apply this rule, there muſt be ſome principle or criterion by which it may be known or aſcertained.

But ſince it cannot be doubted that there is no other rule of human actions but the will or law of God (§ 63), it is to be enquired how we may come to the certain knowledge of this law. But ſince it is univerſally acknowledged to be promulgated to all men by right reaſon (§ 11), and ſince right reaſon is our faculty of reaſoning, by which we deduce truths from other truths by a chain of conſequences (§ 15), it is obvious that there muſt be ſome truth or propoſition, from which what is agreeable to the will of God, and therefore juſt, may be aſcertained by neceſſary conſequence. There muſt then be ſome univerſal principle of ſcience with regard to the law of nature*.

* How that differs from the rule itſelf, hath been already explained (§ 60). Tho' the celebrated Sam. de Cocceiis hath taken the term *principle* in a larger acceptation, yet what is objected to him by Jac. Frid. Ludovici is a mere logomachy. For how the will of God may be diſcovered by us, he ſhews Diſſer. 1. qu. 3. and he has there clearly diſtinguiſhed between the *will of God*, as a rule and principle *eſſendi*, *i. e.* of moral obligation, and the means of ſcience, or the proofs by which the will of God may be aſcertained to us, which are the principles of ſcience with reſpect to the law of nature.

Sect. LXVIII.

This principle muſt be true, evident, and adequate.

Every principle of ſcience muſt be *true*, *evident*, and *adequate*; wherefore the principle of ſcience, with reſpect to natural law, muſt be *true*; leſt being falſe or fictitious, the concluſions inferred from it be ſuch likewiſe: it muſt be *evident*, and that not only in this ſenſe, that it is intelligible to the literate; but univerſally, to the unlearned as well as the learned, all being equally under obligation to conform themſelves to the law of nature. In fine, it muſt be *adequate*, or of ſuch an extent, as to include in it all the duties of men and citizens, not Chriſtians only, but thoſe alſo who have not the benefit of divine revelation *.

* In like manner therefore, as the more ſubtile demonſtrations of the divine exiſtence are ſuſpected, becauſe that truth muſt be capable of an evidence that may be underſtood by the moſt ordinary underſtanding (and therefore the apoſtle ſays, " God may be found out by ſearching, and is not far from any of us," *Acts* xvii. 27.) So a too ſubtle principle of natural law is ſuſpicious, ſince all are, ἀναπολόγητοι, without excuſe, even the illiterate, and thoſe who are ſtrangers to ſubtle refined philoſophy, if they offend againſt the law of nature.

Sect. LXIX.

Whence this principle is not to be found in the ſanctity of God.

Therefore we muſt not expect to find this principle of the law of nature in the conformity of our actions to the ſanctity of God: for tho' the propoſition ſhould be granted to be true, yet it is not evident enough, nor of ſuch a nature, as that all the duties of men and citizens can be inferred and proved from it *.

* How obſcure the idea of the divine ſanctity is, whether in a theological or juridical ſenſe, hath been already proved by Sam. Puffendorf. Specim. controverſ. 4. 4. and Thomaſ. fundam. juris. nat. & gent. And becauſe there are many human duties, of which there is no archetype in God, as for inſtance, gratitude towards our benefactors, reverence toward our ſuperiors, paying debt, and ſuch like: For theſe reaſons it is not the principle of moral knowledge.

Sect. LXX.

Nor in the juſtice and injuſtice of actions conſidered in themſelves.

Nor is this a ſufficient principle, " that what is in its own nature juſt is to be done, and what is in its own nature unjuſt is not to be done." For tho' we have already admitted, that certain actions are in their own nature good, and others evil, and that man is therefore obliged to perform the one, and to avoid the other, by an intrinſic obligation (§ 8); yet an action antecedently to, or independently of a law, is not juſt (§ 7); not to add that this principle is not evident enough, nor that all human offices are not deducible from it *.

* To juſt actions we are impelled by an external obligation (§ 7). External obligation conſiſts in the will of an acknowledged ſuperior, commanding under penalty (§ 9): ſuch a will is a law (§ 9). Wherefore, no action can be juſt or unjuſt but in reference to a law: and hence every ſin is called *ἀνομία*, *i. e.* a tranſgreſſion of a law. 1 Ep. *John* iii. 4.

Sect. LXXI.

Nor in the conſent of all nations.

None, I think, will raſhly go into the opinion of thoſe learned men, who held the conſent of all nations, or of all the more civilized nations, to be the principle of natural law. For it is not *true*, that what all nations agree in, is alſo conformable to the divine will *; nor is this univerſal conſent *evident* to all, ſince it muſt be collected from various teſtimonies of authors, antient and modern; nor is it ſufficiently *adequate* to point out all duties *.

* Thus Cicero thought the voluntary law of nations, as it is called, muſt be eſtabliſhed, Tuſc. queſt. diſp. 1. 13. " The agreement of all nations in a thing is to be held a law of nature." Grotius lays great ſtreſs on this principle de jure belli & pacis, proleg. § 11. where ſpeaking of the way of eſtabliſhing the laws of nature and nations, he ſays, " I have made uſe of the teſtimonies of Philoſophers, Hiſtorians, Poets, and in the laſt place Orators; not that we are raſhly and implicitly to give credit to whatever they ſay (for it is uſual with them to accommodate themſelves to the prejudices of their ſect, the nature of their ſubject, and the intereſt of their cauſe): But that when many men of different times and places unanimouſly affirm the ſame thing for truth, this ought to be aſcribed to an univerſal cauſe; which, in the queſtions treated of by us, can be no

other than either a juſt concluſion drawn from the principles of nature, or an univerſal conſent. The former points out the law of nature, the other the law of nations." But we find a wonderful conſent almoſt of all nations in many things which none will aſſert to be of the law of nature or nations; as in polytheiſm, idolatry, ſacrifices, robbery committed in a foreign territory. Beſides this agreement of nations is not eaſily ſhewn, as Grotius himſelf confeſſes, l. 1. 1. 15. "But the more extenſive is the law of nations, which derives its authority from the will of all, or at leaſt, of many nations. I ſay, of many, becauſe there is ſcarce any right found, except that of nature, which is alſo called the right of nations, common to all nations. Nay, that which is reputed the right or law of nations in one part of the world, is not ſo in another, as we ſhall ſhew hereafter, where we come to treat of *priſoners of war* and *poſtliminy*, or the *right of returning*." How many duties therefore cannot be deduced from the conſent of nations?

Sect. LXXII.

Nor in the ſeven precepts of *Noah*.

But as thoſe who endeavour to eſtabliſh the law of nature and nations from the conſent of nations, not only lay down a falſe, unevident, and unadequate principle; but likewiſe go out of the queſtion into one of another kind, while they derive the law of nature not from nature itſelf, but from the traditions or opinions of nations: ſo the opinion of thoſe who have attempted to deduce the law of nature and nations from the precepts given to Noah, labours under the ſame defects, as hath been ſufficiently proved (§ 16).

Sect. LXXIII.

Nor in the right of all to all things, or in the ſtudy of external peace.

What ſhall we then ſay of the whole philoſophy of Hobbes in his books de Cive, or his Leviathan? when he aſſerts the right of every man in a ſtate of nature to all things, he affirms a propoſition which is neither *true*, nor *evident*, nor *adequate*, ſince the duties of men to God and themſelves cannot be deduced from that principle; yea, while he goes about in that manner, pretending to eſtabliſh the law of nature, he really ſubverts it, as Hen. Cocei. def. de jure omnium in omnia, has ſhewn. Hence it is plain what we are to think of this other principle, viz. "that external peace is to be ſought and ſtudied if it can be obtained, and if not, force and war muſt be called to our aid." For here likewiſe Hobbes lurks behind a curtain *.

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* Firſt of all, this principle is far from being evident. For what means this limitation, *if it can be had?* How liable is it, however it may be explained, to be abuſed by litigious perſons, who will complain that they cannot enjoy peace, if others will not ſuffer them? like the wolf in the fable, who pled that the lamb had troubled his water. Phæd. Fab. 1. 1. Some poet has juſtly ſaid,

Sic nocet innocuo nocuus, cauſſamque nocendi
Invenit. Heu regnant qualibet arte lupi.

This defect in this principle hath been already obſerved by Thomaſ. in Fundam. Jur. nat. & gent. 1. 6. 18.

Sect. LXXIV.

Nor in the ſtate of integrity.

That principle laid down by Val. Alberti profeſſor of divinity and philoſophy at Leipſic, hath a ſpecious ſhew of truth and piety, viz. a ſtate of *integrity*. But Puffend. Specim. controv. 4. 12. and Thomaſ. juriſp. divin. 4. 40 & ſeq. have proved it to be falſe. And granting it to be true, that whatever is agreeable to a ſtate of *primitive integrity*, is truly of the law of nature; yet how unevident this principle muſt be, not only to Pagans, but even to Chriſtians, is manifeſt. Further, ſince the laws of citizenſhip, of war, of contracts, and many others, for which there was not place in that moſt happy ſtate, cannot be deduced from the idea of it, who can call this principle *adequate* *?

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* How few things are told us in the ſacred records that can give us an image of that ſtate of integrity? About what is revealed to us in ſcripture concerning that ſtate, Chriſtians are divided into various ſects and very differing

opinions. What then ſhall we ſay of the Heathens, ancient and modern? They have a fable among them about a golden age, which ſome imagine to have taken its riſe from a tradition concerning the paradiſe-ſtate. They have other fictions with which they are highly delighted, which have ſome reſemblance to the Chriſtian doctrine concerning God, of which Pet. Dan. Huet. Quæſt. Alnet. p. 172. hath treated in the learned manner ſo peculiar to him. But ſo diſſonant and widely differing are all theſe things, that no Chriſtian will ever be able to perſuade a Pagan, nor no Pagan a Chriſtian, that this or the other thing is of the law of nature, which the one derives from his traditions and the other from his revelation, with relation to a ſtate of integrity. We muſt therefore find out ſome principle common to Jews, Chriſtians and Pagans, which can be no other but that right reaſon which is common to all mankind.

Sect. LXXV.

Nor in ſociability.

Grotius, Puffendorf, and ſeveral antients, were wonderfully pleaſed with the principle of *ſociability*; nor can it be denied, as we have afterwards expreſly proved, that men are ſo framed that they muſt live *ſocially*: but that this is not the *true*, *evident*, and *adequate* principle of the law of nature, hath been already demonſtrated by the learned and worthy Sam. de Coccius de principio juris nat. diſſ. 1. qu. 2. § 9. I ſhall only add this one thing, that many of our duties to God, and to ourſelves, would take place, even tho' man lived ſolitary, and without *ſociety* in the world *.

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* Cicero de legibus 1. 5. de off. 1. 16. & ſeq. Seneca de Benef. 4. 18. Iamblichus in Protrept. cap. 20, and ſeveral others, have conſidered the preſervation of ſociety as the true fountain of juſtice, and the foundation of natural law: many authors of this ſentiment are accumulated by Puffendorf de jure nat. & gent. 2. 3. 15. and Jo. Hen. Boecler. in Grotii proleg. p. 48. But however many, formerly or at preſent, may have concurred in this opinion, we cannot however chooſe but obſerve there is a great difference amongſt them in their account of the reaſon by which men are obliged to ſociability: Some aſſert,

we are inſtigated to it by nature; ſome that we are bound to it by the will of God: others again maintain, that neceſſity alone compels men to a ſocial life.

Sect. LXXVI.

Nor in the order of nature, and ſuch like hypotheſes.

Other principles of natural law are highly boaſted of by others; ſuch as the order of nature, which the Creator intends in his works; the intereſt of mankind; a moral Theocracy, and other ſuch like principles *. But it is agreed to by all, that theſe principles are not evident or adequate; and ſome of them indeed cannot be admitted without ſome cautions and reſtrictions.

Sect. LXXVII.

The will of God intends our happineſs.

But to give the opinion, which, upon a mature examination of this ſubject, appears to me the moſt ſolid, firſt of all I would obſerve, that God being infinitely wiſe and good, cannot will any thing elſe with relation to mankind but their happineſs. For being perfect, he ſtands in no need of any thing; and therefore men, who of all the beings within our cognizance, alone are capable of felicity, were not created by him

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* After Sfort. Palavicinus, Hen. Bodinus in Diſſer. de jure mundi, maintained the order of nature to be the firſt principle of natural law. But the latter hath been refuted by Thomaſius de fundam. definiendi cauſſ. matr. hact. recept. inſufficient. § 18. The utility of mankind hath been aſſerted to be the firſt principle by the famous Leibnitz and others, who with Thomaſius have ſet up this propoſition as fundamental, "That all things are to be done which tend to make human life more happy and more laſting, and that all things are to be avoided which tend to render it unhappy, or to accelerate death, Thom. fund. jur. nat. & gent. 1. 6. 21. A moral theocracy was aſſerted to be the firſt principle in a diſſertation to that effect, by Jo. Shute an Engliſhman; from which ingenious diſſertation, ſeveral obſervations are excerpted by the often cited Sam. de Cocceis de princip. juris nat. & gent. diſſ. 1. qu. 3. § 8.

for his own advantage, but that he might render them capable of true happineſs *.

* We do not exclude the primary end, which is the glory of the Creator, and the manifeſtation of his perfections, which ſo clearly appear in his works. But this end is univerſal, and extends to the whole univerſe. Wolf. von den Abſichten der Dinge. cap. 1. § 2. cap. 2. § 1. The particular end for which God created man, muſt be inferred from the eſſential parts and properties of which man conſiſts or is compoſed. Since therefore, he is endued with *underſtanding*, by which he may come to the knowledge of God and of true good; with *will*, by which he is capable of enjoying God and true good; and he hath a *body*, by means of which he can produce various actions, which tend to acquire and preſerve his true happineſs; hence it is manifeſt that God made man that he might be a partaker of true felicity.

Sect. LXXVIII.

To this the will of God obliges us.

This being the will of God, that man ſhould aim at and purſue true happineſs, and his will being the rule of human free actions, and therefore the ſource of the law of nature and juſtice (§ 62); by conſequence whereas, human legiſlators being themſelves indigent in ſeveral reſpects, have their own advantage no leſs in view than that of their ſubjects in making laws, God, on the contrary, muſt have made laws to men ſolely for their own benefit, and have intended nothing by them but their attainment to true happineſs, by conforming themſelves to them *.

* Therefore utility cannot be ſaid, with Carneades and others, to be the ſole ſource of juſtice and equity (§ 76). For the law of nature would thus not be obligatory, but might be renounced by any one at his pleaſure, or by all mankind, as Sam. de Cocceiis has proved, Diſſ. 1. qu. 2. § 9. But whatever we do for the ſake of our true happineſs, according to the law of nature, we do it agreeably to the divine will and command, and therefore, according to obligation not merely internal, but likewiſe extrinſical;

ſical: and for that reaſon, ſo far is any one from having a right to renounce his happineſs, that on the contrary, any one would no leſs deſerve puniſhment by violating a natural law conſtituted for his good, than any one who in a common-wealth ſhould offend againſt a law eſtabliſhed for the public good.

Sect. LXXIX.

If therefore God intend the happineſs of mankind, and the law of nature be directed towards it as its end (§ 78), and true happineſs conſiſt in the enjoyment of good, and the abſence of evil; the conſequence muſt be, that by the law of nature God muſt intend that we may attain to the enjoyment of true good, and avoid evil. But ſince we can only enjoy good by love, hence we infer that God obliges us to love, and that love is the principle of natural law, and, as it were, a compend of it *.

That happineſs conſiſts in the fruition of good by love; and therefore love is the principle of the law of nature.

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* Here we ſee a wonderful harmony and conſent, between the natural and revealed law or will of God. Our Saviour gives us a ſummary of revealed law in theſe few words: "Thou ſhalt love God with all thine heart, and with all thy ſoul, with all thy mind, and with all thy ſtrength: and thou ſhalt love thy neighbour as thy ſelf." *Matt.* xxxii. 37. *Luke* x. 27. and he adds, "upon theſe hang the law and the prophets." Agreeably to this doctrine of our Saviour, the apoſtles call love ſometimes ἀνακεφαλαίωσιν τȣ̃ νόμȣ, the ſum of the law; ſometimes πλήρωμα νόμȣ, the fulfilment of the law; at other times, συνδεσμον τῆς τελειότητος, the bond of perfectneſs; and ſometimes, τὸ τέλος τῆς παραγγελίας, the end of the commandment, *Rom.* xiii. 9. *Coloſſ.* iii. 14. 1 *Tim.* i. 5. But right reaſon teaches the ſame truth, and inculcates no other principle of natural law but *love*, as the ſole mean by which we can come to the enjoyment of that happineſs or true good, which is the intention of God and of his law; whence Leibnitz alſo, Præf. t. 1. cod. juris gentium diplom. defines juſtice to be, *the love of a wiſe man.*

Sect. LXXX.

Love in us is the deſire of good, joined with delight in its perfection and happineſs. *Hatred* is

What is love and hatred?

averſion from evil, joined with ſatisfaction in its unhappineſs; wherefore what we *love*, we receive pleaſure from its perfection and happineſs, and we are diſpoſed to promote that perfection and happineſs to the utmoſt of our power. What, on the contrary, we *hate*, we rather deſire its miſery than its happineſs.

Sect. LXXXI.

Love does not give uneaſineſs.

Since we receive ſatisfaction from the excellence and happineſs of what we *love* (§ 80) it is obvious that the lover does not will to give uneaſineſs to what he loves; nay, he rather ſuffers pain if any other ſhould attempt any ſuch thing. For becauſe he who gives uneaſineſs to one, or ſuffers it to be done without feeling any pain, takes pleaſure in another's unhappineſs; but to take delight in the ſuffering of any one, is the ſame as to hate (§ 80); and to love and hate the ſame object at one and the ſame time is a contradiction; the conſequence is, that it is inconſiſtent or impoſſible at the ſame time to love one, and to hurt him; or to bear his being hurted by another without diſturbance and pain.

Sect. LXXXII.

Hence the firſt degree of love, which we call the love of juſtice.

One may be hurt two ways, either by doing ſomething which makes him more unhappy than he is by nature, or by depriving him of ſome happineſs he is already poſſeſſed of. But ſeeing to do ſomething which conduces to render one more unhappy than he is, is to *hurt* one; and to diſpoſſeſs one of ſomething he hath juſtly acquired, and which contributes to his happineſs, is to *deny* one, *or to take from him ſomething that belongs to him*; hence it follows, that he violates the law of love in the higheſt manner who hurts one, and diſturbs his poſſeſſion, or takes it away, and hinders his enjoyment of it; and, on the other hand, the loweſt degree of love is to hurt no perſon, but to render to every one what is due to him, or leave him in the undiſturbed poſſeſſion and enjoyment of what he hath; which degree of love we call the *love of juſtice* *.

* This is obſerved by Seneca in his Ep. 95. where he ſays, how ſmall a thing is it *not to hurt* him whom we ought to profit! He who does not hurt any one is only not a ſcelerate: he has not yet attained to that kind of juſtice which the law of love requires, even to do good to others to the utmoſt of our abilities, and therefore he hath no virtue to glory in. Whence Leibnitz, in Præf. cod. dip. diſtinguiſhes three gradations in the law of nature. *Strict juſtice*, which is to do no hurt; *equity* or *love*, which is to render to every one what is due to him; and *piety*, which diſpoſes to obſerve all the rules of virtue; but we muſt differ from him with regard to his ſecond gradation, becauſe he likewiſe gives to another his due or his own, who renders what is due to him in ſtrict juſtice, and therefore *rendering to every one his own*, is not to be referred ſolely to diſtributive juſtice.

Sect. LXXXIII.

From which there is another very differing degree, which we call the love of humanity and beneficence.

But becauſe a lover receives pleaſure from the happineſs of him whom he loves (§ 80), it follows that he renders to him whom he loves chearfully, even that which is not ſtrictly due to him, or his right, if he perceives it to be conducive to his happineſs: and this is a more ſublime degree of love, which we call *love of humanity, or beneficence* *. But becauſe we call the capacity of diſcerning things which are contributive to our own happineſs and that of others, *prudence* or *wiſdom*; it is obvious that this love of humanity or beneficence muſt have wiſdom for its guide and director *.

* Humanity and beneficence differ in this, that by the former we render to others whatever we can do, without any detriment to ourſelves, for their advantage: the latter makes us not ſpare our own goods in order to benefit others, but diſpoſes us to do kind offices to them to our own prejudice. Of the former Cicero ſpeaks de off. 1. 16. "All theſe things ſeem to be common to all men, which

" are of the kind deſcribed by Ennius in one inſtance, " He that directs the wandering traveller, doth, as it " were, light anothers torch by his own, which gives " never the leſs light, for that it gave another." By this ſingle example he clearly points out us, that we ought to render even to ſtrangers, whatever good offices may be done to them without prejudicing ourſelves. Whence theſe following, and others of the ſame nature, are called common benefits, " To ſuffer any one to take from our fire to " kindle his: To give good and faithful advice to one who " is deliberating, And all things, in one word, which are " beneficial to the receiver, and nowiſe hurtful to the " giver." Of the latter Seneca has wrote a book which is entitled *De beneficiis*, concerning benefits.

Sect. LXXXIV.

The difference between them in reſpect of obligation.

Moreover, whereas he who does not obſerve the love of juſtice, who hath it not, or does not act conformably to it, is a profligate perſon; he, on the other hand, who hath not the love of humanity and beneficence, can only be ſaid not to perform the nobler and greater virtues (§ 82). Now none may be forced to do virtuous actions, but all acts of wickedneſs may be reſtrained by puniſhments (§ 9). Whence it is plain, that men may be compelled to acts of juſtice, but not to acts of humanity and beneficence. But when obligation is joined with coaction, it is *perfect*; when it is not, it is *imperfect* (§ 9). We are therefore *perfectly* obliged to the love of juſtice, and *but imperfectly* to the love of humanity and beneficence *.

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* Thoſe who fulfil their imperfect obligations are ſaid by Seneca to be good men according to the letter of the law; but elſewhere he ſhews it to be a very ſmall attainment to be good in that ſenſe only; and that in order to merit the character of a wiſe and virtuous man much more is required, even the love of beneficence, to which one knows he is not ſtrictly obliged. " Many good offices, ſays he, are not commanded by law, and do not found an action, which however the circumſtances and condition of human life, more powerful than all law, render fit or lay a

foundation for. No human law forbids us to diſcover our friend's ſecrets; no human law commands us to keep faith with our enemy. What law obliges us to fulfil our promiſe to any one? Yet I will complain of him, and quarrel with him, who hath not kept the ſecret entruſted to him, and will look upon him with indignation who does not keep his pledged faith." Seneca de beneficiis, v. 21.

Sect. LXXXV.

Love, how diſtinguiſhed in reſpect of its object.

Since *love* always tends towards good (§ 80). But whatever we embrace with affection as good, muſt either be a more perfect being than our ſelves, equal, or inferior to us, and leſs excellent. Love of the firſt kind, we call *love of devotion* or *obedience*; love of the ſecond kind, we call *love of friendſhip*; and love of the third ſort, we call *benevolence*.

Sect. LXXXVI.

What love of devotion is; what love of friendſhip; and what benevolence?

Love of devotion or *obedience*, is love towards a more excellent and perfect being, with whoſe excellence and happineſs we are ſo delighted, that we look upon ſuch a being, as to be honoured and obeyed with the higheſt complacency and veneration. The *love of friendſhip* is the love of our equal, or ſatisfaction and delight in his happineſs, equal to what we perceive in our own. The *love of benevolence*, is the love of an inferior and more imperfect being, which diſpoſes us ſeriouſly to promote its happineſs, as much as the nature of the being permits.

Sect. LXXXVII.

The nature of the love of devotion and obedience.

From theſe definitions it follows, that we cannot have love of devotion or obedience towards a being, unleſs we be perſuaded of its ſuperiority and greater perfection; nor can this love take place, unleſs ſuch a being be of ſuch a character and temper as to deſire to be loved by us. And this love ought always to be joined with veneration and obedience ſuitable to the perfections of ſuch a being *.

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* For veneration or honour is a juſt eſteem of the perfections belonging to a being; obedience is a diſpoſition to perform with readineſs, whatever another as ſuperior hath a title to exact from us, and to with-hold from doing what he forbids. But ſince there may be various degrees of perfection and ſuperiority, there will alſo be as many various degrees of veneration and obedience; and the more ſublime the perfection of a being is, the greater veneration and obedience are due to that being.

Sect. LXXXVIII.

The love of friendſhip its nature.

Further it is plain that the love of friendſhip ariſes from equality. Now equality is either an equality of *nature*, or an equality of *perfections*. Wherefore, where the former takes place, equal offices of love are reciprocally due; and for that reaſon, amongſt all who are by nature equal, theſe incomparable rules ought to obtain. "Whatever you "would not have done to yourſelf, do it not to an"other." And, "Whatever you would have an"other do to you do unto them." Matt. vii. 12. Luke vi. 31. Tob. iv. 16. The firſt of which is the foundation of the love of juſtice; the other, of the love of beneficence and humanity. But becauſe, however equal the being beloved, and the being loving may be by nature, yet the one may be either more perfect, or more imperfect than the other; it may happen that we may be obliged to have at the ſame time a love of friendſhip towards a man, as equal to us by nature, and a love of devotion and obedience, or of benevolence towards him as being more perfect or more imperfect *.

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* Thus, tho' a prince as ſuperior hath a right to our veneration and obedience, that does not hinder but that he is obliged to render to us the good offices founded upon equality of nature: as for inſtance, not to do us any injury; not to fix ignominy upon what does not deſerve it; and in

one word, to do what Pliny commends in Trajan, i. e. "to remember no leſs that he is a man, than that he is ſet over other men to rule them."

Sect. LXXXIX.

The love of benevolence.

Finally, ſince benevolence ſeeks the enlargement and promotion of the happineſs of a more imperfect being, as much as its nature is capable of happineſs *(§ 86).* Hence it follows, that we ought not to hurt ſuch a being, or refuſe to it what is its right and due; but that we ought to do good to it, to the utmoſt of our power, with prudence however; and therefore whatever kindneſs is not agreeable to reaſon, or conducted by prudence, is not benevolence and liberality, but profuſion, or any thing elſe you pleaſe to call it.

Sect. XC.

What are the objects of this love?

Now if we conſider accurately the beings with which we are ſurrounded, we ſhall find there are three only, to which we are under obligation to render the offices of love: God, the creator of all things; ourſelves, who are certainly the neareſt to ourſelves; and other men, whom we plainly perceive to be by nature equal to us. For as to ſpirits, ſuch as angels, we know not their nature, nor have we ſuch commerce with them, as to be under the obligation of certain duties towards them. And between men and brutes there is no communion of right, and therefore no duty is properly owing to them; but we owe this to God not perverſely to abuſe any of his creatures *. Puffend. de jure nat. & gent. 4. 3. 6.

* For ſuch a communion of right muſt, as we ſhall ſhew afterwards, ariſe from compact. But brutes are not ſuſceptible whether of active or paſſive obligation ariſing from compact. We cannot therefore aſſent to the Pythagoreans, Porphyry, in his books, περι αποχῆς, who not only aſcribe ſenſe and memory, but a rational

mind to brutes. However ſo far as men perceive any affection in brutes, ſo far do they render a love of benevolence toward them; ſo as not to abuſe their power of killing them, but to take pleaſure in rendering their life more commodious to them, as we ſee in the inſtance of domeſtic dogs Plutarch elegantly obſerves in Caton. major. "But we ſee benignity hath a much larger field than "juſtice; we ſometimes extend beneficence to brute ani-"mals thro' the largeneſs of bounty; for a merciful man "looks upon himſelf as obliged to take care of horſes which "work for him, and not only of young animals but of "old ones."

Sect. XCI.

The firſt axiom of love to God.

Since we cannot conceive otherwiſe of God than as a moſt excellent, moſt perfect, and infinitely good Being, upon whom depends abſolutely our exiſtence and felicity, of whoſe ſuperiority we are abſolutely perſuaded, as well as of his will and deſire to be loved by us (§ 87), it follows, that we owe to him a love of devotion and obedience, which that it may be worthy or ſuitable to a moſt perfect Being, this rule or maxim immediately occurs, "That God, upon whom we abſolutely depend, ought to be adored by us with all the vigour of our mind; and that to him ought to be rendered the moſt perfect and ſincere obedience *."

* For ſince the veneration we pay to a ſuperior Being ought to be ſuitable to it (§ 87); we cannot but hence infer that the higheſt veneration is due to the moſt perfect Being. And becauſe God knows moſt perfectly, not only our external actions, but likewiſe all the inward motions of our mind; we owe to him, not merely external ſigns of veneration, but inward reverence and piety. And this is that worſhip and love which the ſacred writings require of us.

Sect. XCII.

A ſecond axiom concerning love to ourſelves.

Our love to ourſelves muſt conſiſt in ſatisfaction and delight in our own perfection and happineſs (§ 80). Hence therefore we are obliged to purſue the preſervation and augmentation of our perfection and happineſs with all our might. But ſince the more perfect a being is, the more honour and obedience we owe to it (§ 87); we muſt take care that we do not love ourſelves more than God, leaſt our ſelf-love ſhould thus degenerate into immoderate and unproportioned ſelfiſhneſs. Whence flows this other maxim, "That man is obliged to omit nothing, that may conduce to preſerve, promote, or augment his perfection and happineſs, which is conſiſtent with his love of God *."

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* For God obliges man to ſeek after the enjoyment of good (§ 79), and therefore to promote and preſerve his own happineſs; becauſe therefore ſometimes goods are preſented to him, of which one is greater than the other; and that leſſer good which deprives us of a greater one, ought to be eſteemed an evil, it is obvious that God obliges us to chooſe that which of many goods is the greateſt.

Sect. XCIII.

A third axiom concerning love to others.

Since moreover all men are by nature equal, and that natural equality requires a reciprocal obligation to equal love (§ 88); the conſequence of this is, that we are obliged to delight in the happineſs of others, not leſs, but not more than in our own; and therefore to love others as ourſelves; but ourſelves not leſs than our neighbour. Whence flows a third maxim, "That man is obliged to love his fellow-creature no leſs than himſelf, and conſequently not to do to any other, what he would not have him do to him; but, on the other hand, to do to another all thoſe offices of kindneſs which he can reaſonably deſire them to render to him."

Sect. XCIV.

This principle is true, evident and adequate.

In fine, upon a due conſideration of the pre-requiſites to a principle of moral ſcience which have been explained, we will find that this is the moſt genuine principle of moral ſcience. Nothing can be more *certain*, it neceſſarily flows from the divine will and the nature of man; and, which is very ſatisfactory to me, it is authoriſed by the ſacred writings. Nothing can be more *evident*, ſince it is ſuch as may be eaſily conceived by the unaſſiſted reaſon of every man, even among Pagans. Nothing can more *adequate*, for in fact we ſhall ſoon ſee, that there is no duty of a man as ſuch, or of a citizen, which may not be eaſily and clearly deduced from this firſt principle.

REMARKS on this chapter.

I can't help thinking that our excellent author is not ſo diſtinct in this chapter as he ought to have been, and withal too tedious. It was indeed neceſſary to diſtinguiſh between the *principle which conſtitutes external or legal obligation*, and the *principle which is the medium of knowledge with regard to it*; *or the mean by which it may be known and demonſtrated.* Now it is the will of God which conſtitutes external or legal obligation. But what is the medium by which the divine will may be known? Our author had already often ſaid, that right reaſon is the faculty by which it may be known. But hence it follows, that conformity to reaſon, is the mean by which agreeableneſs to the divine will may be known and demonſtrated. Why then does he diſpute againſt thoſe who ſay conformity to Reaſon, or which comes to the ſame thing, to our rational nature, is the principle or mean of moral knowledge? Or why does he not immediately proceed to enquire what is, and what is not agreeable to reaſon or our rational nature? Why does he diſpute againſt thoſe who in their reaſonings about the laws of nature, infer them from the divine ſanctity or moral rectitude, which muſt mean reaſon, or our rational nature compared with the rational nature of the ſupreme Being? For if the law of nature be diſcoverable by reaſon, conformity to reaſon, to the reaſon of God, and the reaſon of man, muſt be the *principle* of knowledge with regard to the law of nature. Nor can the divine ſanctity or divine moral rectitude be an obſcure idea, unleſs conformity to reaſon, or to a reaſonable nature, be an obſcure idea. Our author ſeems to have forgot what he ſaid (§ 1), when he ſays (§ 86), that the happineſs and perfection of mankind is not a principle from which the law of nature can be inferred; and what he here refutes, he afterwards (§ 77) returns to, as a neceſſary firſt principle in demonſtrating the law of nature, *viz.* "That God intends the "happineſs and perfection of mankind." For if his reaſoning,

(§ 77) be juſt, the buſineſs of the moral ſcience is to enquire what tends to the perfection and happineſs of man, and what is neceſſary to it; and theſe will be good moral reaſonings, which ſhew an action to be conducive to human happineſs and perfection, or contrariwiſe: For thus they ſhew what the divine will commands, and what it forbids: nay, according to his reaſoning in that ſection, we cannot advance one ſtep in morals, without firſt determining what our happineſs and perfection requires, and what is repugnant to it. He ſeems likewiſe (§ 70) where he ſays, "That the intrinſic pravity or goodneſs of actions, is not a "ſufficient principle for deducing and eſtabliſhing the moral "laws of nature," to have forgot what he had ſaid in the former chapter, and frequently repeats in ſucceeding ones, of the *priority* in *nature* or *idea* of *internal* to *external* obligation. And indeed, to ſay that the laws of nature concerning human conduct, cannot be deduced from the conſideration of the internal nature of actions, is in other words to ſay, that they cannot be deduced by reaſon; for it is to ſay, that they cannot be deduced from the conformity or diſconformity of actions to reaſon. All I would infer from this is, 1. That it is impoſſible to make one ſtep in moral reaſonings, without owning a difference between conformity and diſagreeableneſs to reaſon, and uſing that general expreſſion, or ſome one equivalent to it; for the will of God cannot be inferred but from conformity to reaſon, or ſomething equivalent to it, i. e. from ſome principle, which however it may be expreſſed, ultimately ſignifies conformity to the nature of things, or to reaſon. 2. That conformity to reaſon, to a reaſonable nature, to moral rectitude, to the divine nature, and conduciveneſs to the perfection and happineſs of a rational being, or conduciveneſs to the perfection and happineſs of man, as ſuch, and ſeveral other ſuch phraſes uſed by moraliſts, have and muſt all have the ſame meaning, or terminate in the ſame thing. 3. That to aſk why a reaſonable being ought to act agreeably to reaſon, is to aſk why it is reaſonable to act reaſonably; or why reaſonable is reaſonable. This muſt be the meaning of that queſtion, as it is diſtinguiſhed from this other, "Is there good "ground to think, that the ſupreme Being, the maker and go"vernor of the univerſe, wills that his reaſonable creatures "ſhould act reaſonably, and will proportion their happineſs ac"cording to their behaviour?" which queſtion does likewiſe amount in other terms, to aſking whether it is agreeable to ſupreme reaſon, to approve acting according to reaſon? There is therefore no neceſſity of dwelling long upon either of theſe queſtions in moral philoſophy; but it is its buſineſs to enquire what rules of conduct, what methods of action are agreeable, and what are diſagreeable to reaſon, to the nature of things, to the qualities of reaſonable beings, to the perfection and happineſs of mankind as ſuch; all which phraſes, as hath been ſaid, muſt have the ſame meaning, and may therefore be promiſcuouſly uſed: And indeed about them there can be no diſpute, unleſs one has a mind to make a particular favourite of ſome one of them in oppoſition to all the reſt; in which caſe, the diſpute, 'tis evident, will be merely about a phraſe; as in fact, moſt diſputes in the moral ſcience realy are, for that very reaſon, viz. through a particular liking to ſome favourite words.

Our author's method of reaſoning is, when he brings it out, plain and juſt enough. It amounts to this, "If we own the "being of a God, and have a clear and juſt idea of his per-"fection, we muſt own that he wills the perfection and happi-"neſs of all his creatures, his moral creatures in particular: "man therefore being a moral creature, God muſt will "the happineſs and perfection of man. He muſt then for that "reaſon, will that man purſue his own perfection and happi-"neſs. But ſuch is the nature of man, and ſo are things relat-"ing to him conſtituted and connected, that the purſuit of his "perfection and happineſs conſiſts in what may properly be ex-"preſſed in one word, *Love*, the love of his Creator, the love of "his fellow creatures, thoſe of his own kind in particular, and "the love of himſelf." Now according to this way of reaſoning what our author hath to prove, is the latter propoſition; and accordingly he goes on in the ſucceeding chapters to prove it.

In other words, our author's manner of deducing human duties amounts to this, "Every *obligation* which man can be under as "a rational agent, *external* or *internal*, may be expreſſed by one "word, *Love*. For we can owe nothing to any being but love: "all our obligations muſt therefore be reducible to theſe three; "the love of our Creator, the love of our fellow-creatures, of "thoſe of our own kind, or with whom we are more nearly "and immediately connected in particular; and the love of "ourſelves." And accordingly our author proceeds to explain the duties belonging to theſe three claſſes. The principle upon which he founds may juſtly be called clear, certain, and adequate. For if there be any ſuch thing as obligation upon a rational agent, external or internal, it can be nothing elſe, but obligation to love: internal obligation can belong to nothing elſe but the dictates and offices of reaſonable love; and therefore external obligation can belong to nothing elſe. Wherefore love is juſtly ſaid in the ſacred writings, to be the fulfilment of the law; of the law of nature, of the law of reaſon, of the law of God. But let me obſerve, that this method of our author's, is the ſame in other words with ſome of them he refutes. For is it not evidently the ſame thing as to ſay "that duty, obligation, or what is reaſonable with regard to human conduct, muſt be inferred from the human nature, and the conſtitution of things relative to him. But according to the frame of man and the conſtitution of things, the chief happineſs and perfection of every man ariſes from the love and the purſuit of order within and without him; or from the obſervation of the prevalency of wiſdom and good order, and conſequently of greater happineſs in the adminiſtration of the univerſe; and from ſuch an orderly diſcipline of his affections as tend to produce univerſal happineſs, order, and perfection, as far as his affections, and the actions they lead to, have any influence? According to which ſtate of the queſtion, the remaining enquiry will be what the love of good order and general happineſs requires.

CHAP. IV.

Of the application of this rule to actions, and the differences of actions proceeding from thence.

Sect. XCV.

The connexion.

HAVING conſidered the nature of human free actions, and the rule according to which they ought to be regulated; the next thing to be conſidered, is the application of this rule to free actions. The application of a law to a fact is called *imputation*, and therefore we ſhall in this chapter treat of it.

Sect. XCVI.

Imputation is made by comparing a law with a fact; and therefore by reaſoning.

Imputation being the application of a law to a fact (§ 95), which cannot be done otherwiſe than by comparing a law and a fact, i. e. by two propoſitions compared together, and with a third by a ſyllogiſm; the conſequence is, that *imputation* is a ſyllogiſm or reaſoning, the major propoſition of which ſignifies a *law*; the minor a certain *action*: and the concluſion is the *ſentence*, with regard to the agreement or diſagreement of the action with the law *.

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* To *impute*, properly ſignifies to place ſomething to the account or charge of another perſon. Sen. epiſt. 8. "Hoc non imputo in ſolutum de tuo tibi." Now as that can't be done without ballancing accounts with one, hence it came about, that this term ſeemed proper to expreſs that application of a law to facts, which is done in like manner by a ſimilar compariſon. Thus when, as the ſtory is told by Livy, Horatius had killed his ſiſter, and a queſtion

aroſe, whether the law againſt murder, ordaining that the perſon guilty of it ſhould have his hands tied, and his head veiled, and be whipped either within or without the walls, and then be hanged upon a tree, ought to be applied to that action? The Duumviri legally appointed by Tullius Hoſtilius the king, to judge of the matter, were of opinion, that the law extended to the fact, upon which one of them pronounced this ſentence: "I find you, Publius Horatius, guilty of murder. Go, lictor, bind his hands." But Horatius appealing, and the father himſelf appearing for him, the people abſolved him. The Duumviri therefore reaſoned in this manner, "He who knowingly with evil deſign kills a perſon, is as a murderer to be puniſhed ſo and ſo. This is the law. Publius Horatius by running his ſiſter through with his ſword, has willingly and with evil intention killed a perſon. This is the fact. He is therefore to be puniſhed ſo and ſo. Here is the ſentence." But the people computed or ſtated the account in another manner thus: "He who kills an enemy to his country, is not to be puniſhed as a murderer. Here is the law. Publius Horatius in killing his ſiſter, killed an enemy of her country. Here is the fact. Therefore he ought not to be puniſhed as a *murderer*. Here is the ſentence, and it is a ſentence of abſolution." The Duumviri therefore imputed the fault to Publius Horatius, but the people did not impute it.

Sect. XCVII.

Wherein it differs from conſcience.

Having ſaid much the ſame thing above concerning *conſcience* (§ 94), which however is not the ſame with *imputation*, let us obſerve wherein the difference between them conſiſts; and it lies in this: Whereas conſcience is a reaſoning about the juſtice and injuſtice of one's own actions: imputation is a reaſoning about the agreement or diſagreement with law of another's actions. In the firſt caſe, every one is his own judge: in the other, another perſon judges of our actions, and compares them with the law *.

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* But becauſe it does not belong to every one to judge of the actions of others, and yet ſuch is the weakneſs of human nature, that moſt perſons are very indulgent to

their own faults, and not very ſevere in ſearching their own conſciences, and yet are very quick-ſighted and rigid with regard to the failings and blemiſhes of others; it is no wonder that judging others is reprehended as unjuſt and wicked, not only by our Saviour, Matt. vii. 1. Luke vi. 37. and by his apoſtle, Rom. ii. 1. xiv. 4. 1 Cor. iv. 5. but likewiſe by profane writers, who had only right reaſon to guide them in their determinations. Hence the pleaſant witty fable of the two budgets, one of which filled with his own faults a man carried on his back, the other filled with the faults of others he carried on his breaſt: To which Phædrus ſubjoins this moral, fab. 4. 9. v. 4.

> *Hac re videre noſtra mala non poſſumus:*
> *Alii ſimul delinquunt, cenſores ſumus.*

Several parallel paſſages of ancient authors are collected by Iſ. Caſaubon, ad Perſ. p. 340. and by learned men upon this fable, whoſe coffers we will not pillage.

Sect. XCVIII.

An action is imputed either by God or by human judges.

Every application of law to fact is called *imputation* (§ 9), whether an action be compared with the divine law or with a human law; and in like manner, whether God himſelf, or men, whoſe office it is, apply law to a fact. The former, however, moraliſts are accuſtomed to call imputation *in foro divino*; the latter in *foro humano*. But there is this very conſiderable difference between the two, that in the latter none ſuffers puniſhment for thoughts, l. 18. D. de poenis; but God being omniſcient, and requiring internal obedience (§ 91), he juſtly imputes to us even thoughts which are diſagreeable to his law *.

* The ancient philoſophers were not ignorant of this truth, and have aſſerted that God ſeeth not only all our outward acts, but likewiſe our moſt ſecret thoughts. So Thales Mileſius, Socrates, Plato and his followers, Pythagoras and his diſciples, and all in general who entertained juſter and ſublimer conceptions concerning God. Teſtimonies to this purpoſe are collected by Huet. in qu. Alnet. ii. 2. 16. Hence we ſee, how reaſonable the interpretation of the Moſaic law is, which our Saviour gave, Matt. v. 22, 28.

Sect. XCIX.

And then man is declared to have merited either puniſhment or reward.

Further, whereas the law which is applied to human actions is enforced by a ſanction (§ 64), hence it it follows, that *to impute* is the ſame as to declare, that the effect which a certain law aſſigns to an action, agrees to ſuch a particular action. This effect is called in general *merit*; *puniſhment*, if the effect of an action exhibited by the law be evil; and *reward*, if the effect be good *.

* But ſince a legiſlator is not obliged to propoſe rewards, hence it is manifeſt that even actions in themſelves juſt are not meritorious. To this purpoſe belongs that remarkable ſaying of Chriſt: " So likewiſe ye, when ye ſhall have done all theſe things which are commanded you, ſay, we are unprofitable ſervants: we have done that which was our duty to do, *Luke* xvii. 10." But if a law-giver promiſes rewards, as God has done, who has enacted his laws, not for his own ſake, but for the advantage of mankind, becauſe he wills their perfect happineſs (§ 78); rewards may be ſaid to be merited, not in reſpect of the law-giver, who of free-goodneſs propoſed them, but in reſpect of imputation.

Sect. C.

The definition of imputation and axioms relative to it.

Imputation therefore is a reaſoning by which an action of another perſon, being, in all its circumſtances, compared with a law, whether divine or human, is declared to merit, or not merit a certain effect propoſed by a law. From which definition it is manifeſt, that we cannot certainly pronounce whether an action be imputable or not, unleſs we have a diſtinct comprehenſion both of the law and of the action in all its circumſtances: and that one circumſtance often alters the whole ſtate of the caſe.

Sect. CI.

It ſuppoſes the knowledge and interpretation of the law.

Since the *law* muſt be known to him who would form a right judgment of the imputability of actions, the conſequence is, that he ought to be ſure there is a certain law, and ought rightly to underſtand

ſtand the whole of that law, and therefore to *interpret* it rightly, if it be conceived in conciſe or obſcure terms; *i. e.* he ought diſtinctly to comprehend the mind of the law-giver declared by words, or by whatever other ſigns.

* Interpretation therefore does not properly belong to the law of nature, but only to poſitive laws, whether divine or human. For ſince legal interpretation is a diſtinct repreſentation of the law-giver's mind, declared by words or other ſigns (§ 101): and the law of nature is not conceived in words, but is promulgated by right reaſon (§ 11): it follows, that the mind of the ſupreme law-giver cannot be collected from words or other ſigns; and therefore this law does not admit of interpretation. Reaſon ſufficiently underſtands itſelf without an interpreter. Arrian. Diſſ. Epict. 1. "The reaſoning faculty being conſcious to itſelf, clearly perceives what it is, and what it can do, and of what price and value it is, if it applies itſelf to the direction of our other faculties."

Sect. CII.

Seeing an *interpreter* repreſents diſtinctly the law-giver's meaning, declared by words or other ſigns; it follows, that in interpreting laws, great attention muſt be given both to the proper and the metaphorical ſignification of words; to their connection with what precedes and what follows, and to the nature and character of the ſubject itſelf; and yet more eſpecially to the ſcope and intention of the law-giver, which induced him to enact the law; wherefore they judge well, and we agree with them who aſſert the reaſon of the law to be its ſpirit or ſoul. See our preface ad Elem. Pandect. Its foundation.

* We have a remarkable example of the utility of this rule in our Saviour's explication of the law about the ſabbath, when he was cenſured by the Jewiſh doctors for teaching, that works of charity and mercy ought not to be intermitted on the ſabbath-day. He on that occaſion ſhews the ſource whence the interpretation of that law muſt be brought. He ſays, "The ſabbath was made for

man, and not man for the ſabbath, *Mar.* ii. 27. From which reaſon of the law it clearly follows, that all works which tend to diſturb the tranquillity and piety of mankind were forbidden to be done on that day; but not ſuch as conduce to human preſervation and happineſs. But take away this ſole and adequate reaſon of that law, and it is moſt certain that in the words of the law themſelves, there is nothing from which one would have inferred our Saviour's doctrine.

Sect. CIII.

Its various ſorts.

Further, ſince the reaſon of a law is as it were its ſoul, hence it muſt follow, that the law ceaſes when the ſole reaſon of it wholly and abſolutely ceaſes: that if it do not agree to a certain caſe, that caſe cannot fall under the law on account of the very reaſon of the law; and this is the foundation of what is called *reſtrictive interpretation*; to which may be rightly referred *equity*, *i. e.* a power of correcting the law in reſpect of univerſality: Grot. de Æquit. indulg. & facilit. c. 1. n. 3. that if the words of a law do not quadrate with a certain caſe, and yet the reaſon of the law be applicable to it, then there is place for what is called *extenſive interpretation*: Finally, that when the words and reaſon of the law keep as it were pace together, then there is only room for *declarative interpretation* *.

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* For example, our Saviour interprets the law of the ſabbath reſtrictively; the laws concerning adultery and homicide extenſively, *Mat.* v. which not being done by the Phariſees, they reaſoned ill concerning the imputation of actions. Hence it was, that they accuſed the apoſtles of impiety for plucking ears of corn on the ſabbath; and our Saviour himſelf for healing the ſick on the ſabbath; and that they reputed thoſe righteous who fulfilled the traditions of the Rabbins, and waſhed, *e. g.* their cups carefully, paid tithes, gave alms to the poor, faſted frequently, though they did all this thro' vain-glory, neglected the weightier matters of the law, and committed groſs crimes.

Sect. CIV.

The difference between authentic, cuſtomary, and doctrinal interpretation.

Beſides, becauſe the law is interpreted either by the legiſlator or judge, or ſome other, to whoſe office it belongs to apply the law to facts, or by a lawyer, interpretation on theſe accounts is therefore called *authentic*, *cuſtomary*, or *doctrinal*; the foundation of the firſt is the will of the legiſlator; of the ſecond, practice in courts of juſtice; and of the laſt, the application of the rules of interpretation abovementioned *.

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* We have examples of all theſe three in the ſacred writings: Thus, after God, *Numb.* xxvii. 7. had given this law: "If a man die and have no ſon, then ye ſhall cauſe his inheritance to paſs unto his daughter," the ſupreme legiſlator himſelf adds this interpretative clauſe, *Numb.* xxxvi. 5, 6. "So ſhall not the inheritance of Iſrael move from tribe to tribe." This is an example of *authentic* interpretation, which is frequently the ſame as a new law. We have an inſtance of *cuſtomary* interpretation, *Ruth* iv, 7. where the plucking off and caſting the ſhoe, which was originally reſtricted to a particular caſe, *Deut.* xxv. 7. is by judicial interpretation extended to rejection of inheritance; with relation to which cuſtom we have a curious diſquiſition by An. Bynæus de Calc. Heb. l. 2. c. 7. Finally, there is an inſtance of *doctrinal* interpretation, *Nehemiah* viii. 13.

Sect. CV.

An action is imputed to its author or cauſe.

Becauſe he who would interpret a law aright, ought to know all the circumſtances of the fact, (§ 108), and the principal circumſtance is the perſon acting; hence we conclude, that an action is to be imputed to him who is the author or cauſe of it; and, on the contrary, imputation ceaſes if any thing be done, of which the doer is neither the cauſe nor the author, tho' we ſometimes impute the merits of one to others; which imputation is commonly called *imputation by favour*, in contradiſtinction to that which is *of debt* or *merit*, ſtrictly ſo called. Puffend. de jur. nat. & gent. 1. 9. 2.

Quære If the fact is true.

* And this is the origine of hereditary nobility; yea, ſometimes of hereditary kingdoms. Thus among the Germans, the diſtinguiſhing nobleneſs, or the eminent ſervices of fathers, gave dignity even to ſtriplings, Tacitus, de moribus Germ. c. 13. And of hereditary kingdoms, Polyb. Hiſt. 6. 5. "This is the origine of hereditary ſovereignty: hence it is, ſubjects obey for a long time, not only kings but their Offspring, through a perſuaſion that being deſcended from them, and educated by them, they will be like to them in temper and diſpoſition."

Sect. CVI.

What actions are not imputable.

If therefore an action be imputed to none, unleſs he be the cauſe or author of it (§ 105); but a perſon cannot be called the author of any action which is not *human*; *i. e.* which is not done by the will, under the direction of the underſtanding (§ 30); hence it is obvious, that neither paſſions, nor natural actions, nor events wholly providential, nor things done in a fit of madneſs, nor natural imperfections either of body or mind, nor things done in ſleep or drunkenneſs can be imputed to any perſon, but ſo far as it depended upon the agent to prevent them (§ 26, 29, 49) *.

* Thus impudence is imputed to one, if he neglect the decorum with regard to natural actions. Thus ſhipwreck is imputed to the commander of the ſhip, if by his fault the ſhip was loſt; whereas in other caſes, what can be more true than what Tacitus ſays, Ann. 14. 3. "Who is ſo unjuſt as to make a crime of what the winds and waves have done?" Thus deformity is imputable to one who has ſacrificed his noſe to Venus, whereas in other caſes Phædrus juſtly pronounces, Fab. 3.

Sed quid fortunæ, ſtulte, delictum arguis?
Id demum eſt homini turpe, quod meruit pati.

Much more reaſonably ſtill is ignorance imputed as a fault to a man who had opportunity of a good education in his youth, which is not reckoned criminal in the vulgar; yea, dreams are imputed, which are occaſioned by waking thoughts and actions throughout the day; of which kind of dreams called by the antients ἐνύπνια, according to Macrobius in Somn. Scip. 1. 13. Claudian juſtly aſſerts,

Omnia, quæ ſenſu voluuntur vota diurno,
Pectore ſopito, reddit amica quies.
Furto gaudet amans, permutat navita merces,
Et vigil elapſas quærit avarus opes.
Hon. Aug. Præf. v. 1.

To which Gaſp. Barth, in his notes, p. 714. has added more examples. In fine, wilful drunkenneſs, and the actions perpetrated in that condition, are imputed for a reaſon that needs not be mentioned, it is ſo obvious.

Sect. CVII.

Whether actions done thro' ignorance or error be imputable.

As for what relates to ignorance and error, ſince both theſe imperfections of the underſtanding are either *culpable* or *inculpable* (§ 48, 49), *vincible* or *invincible*, *voluntary* or *unvoluntary* (50), it follows from the ſame principles, that inculpable, invincible, involuntary ignorance cannot juſtly be imputed to a perſon; but that an action done thro' culpable, vincible, and voluntary ignorance is juſtly imputable: and the ſame holds with regard to error: much leſs can ignorance or error be any excuſe to one, if the action itſelf be unlawful, or be done in an unlawful place, time, or manner; becauſe, in ſuch caſes, it not only was in the agent's power not to be ignorant or not to err, but he was abſolutely obliged to omit the action *.

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* Judah, when he went into Thamar his Daughter-in-law, could not plead ignorance, becauſe the action was in itſelf unlawful, *Gen.* xxxviii. 15, 16. Nor is he excuſable, who ſporting with darts in an unlawful time and place, ignorantly wounds a man, becauſe an action done in a place and time in which it ought not, is in itſelf unlawful, § 4. Inſt. de lege Aquilia. Nor is an injury done to one who was pruning a tree near the highway, if he be charged with killing a man, whom he might have ſaved by calling out to him, § 5. inſtit. eodem. Thoſe who were thus employed among the Romans uſed to cry aloud *cave*, take care: among the Athenians φύλαξαι, as Theod. Marcil. ad § 5. inſtit. eod. ſhews. Wherefore the ſentence of the Areopagites mentioned by Ariſtot. mag. mor. 1. 17. abſolving a woman who killed a young man

by a love-charm which ſhe gave him, becauſe it was not done deſignedly, having given him the draught out of love, and miſſed her aim, was blameable, ſince it proceeded upon a ſuppoſition that it was not unlawful to give ſuch love-making medicines. How much more juſtly does the Roman lawyer Paullus, l. 38. § 5. D. de pœnis, condemn ſuch practices, as giving medicines to create love or abortion: Qui abortionis aut amatorium poculum dant, etſi dolo non faciant, tamen quia mali exempli res eſt, &c.

Sect. CVIII.

Of error in fact and in law.

Further, one may err either in point of *fact* or in point of *law*. To the former belong the rules already laid down (§ 107), becauſe a circumſtance in a fact may eſcape the moſt prudent perſons, and therefore his error, in point of fact, may be *inculpable*, *invincible*, *involuntary*. But error, in point of law, with relation to the law of nature, does not excuſe, becauſe right reaſon promulgates this law to every one, unleſs, perhaps, when age, ſtupidity, and the more ſubtle nature of a particular law dictate a milder ſentence. But as for civil law, ignorance of it is ſo far imputable, as it is ſo framed and promulgated that the perſon might know it *.

* For who would rigidly exact an accurate knowledge of the law of nature from infants, or thoſe hardly arrived beyond the infant ſtate, from deaf and dumb perſons, from changelings, or from ſtupid perſons brought up among the brutes? Beſides, tho' the law of nature be as it were written or engraved on the minds of men, yet it cannot be otherwiſe known than by reaſoning about juſt and unjuſt (§ 15): now, becauſe ſome precepts of the law of nature flow immediately from clear principles of reaſon, others are derived from principles of reaſon by many intermediate ſteps, and a long chain of reaſoning, none can doubt that precepts of the firſt ſort may be known by every perſon who is not quite ſtupid; whereas thoſe of the latter ſort are more difficultly underſtood, and require a more improved and perfect underſtanding. Hence by the Roman law, tho' it reckoned inceſt forbidden by the law of nations, l. 38. § 2. D. ad L. Jul. de adult. c. 68. D. de

rit. nupt. yet the puniſhment was ſometimes mitigated, both with reſpect to men and women; as, for inſtance, if a ſon-in-law ſhould after divorce lie with his mother-in-law, l. 38. § 5. D. ad L. Jul. de adulterio: of which no other reaſon can be given but becauſe the unlawfulneſs of inceſt cannot be inferred immediately, or without a long train of reaſoning from the principles of natural law.

Sect. CIX.

Whether undeſigned and forced actions are imputable.

Since the free will of man muſt concur to render an action ſuch of which one can be called the author and cauſe (§ 30); but unintended actions are ſuch, that they do not proceed from the determination of the mind (§ 58); hence it follows, that an action which one does againſt his will, or without intention, cannot be imputed to him; on the contrary, whatever is done ſpontaneouſly, is imputable, and much more whatever is done of one's own free accord: yea, what one is forced to do is imputable to him, if he who forced him had a right to force him; but not, if he who forces him was not in the exerciſe of his right, or if the perſon forced was, previouſly to the force uſed, under no obligation of doing it *.

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* Becauſe, tho' a perſon compelled or forced wills (§ 58), yet *right* and *obligation* are correlates, which mutually found or deſtroy one the other (§ 7); and therefore, when *right* ceaſes, *obligation* muſt alſo ceaſe: the conſequence from which is, that if the one hath no right to compel, the other can be under no obligation to do what he was unjuſtly compelled to. Hence it is, that the promiſe of a ſtubborn debtor, extorted by the magiſtrate by threatning execution is valid, becauſe the magiſtrate is in the exerciſe of his right when he forces ſtubborn debtors to pay: But if a robber forces a traveller to promiſe him a certain ſum of money, becauſe the robber hath no right to force him, the traveller can be brought under no obligation to perform what he was thus compelled to promiſe. To this effect is that famous Epigram of Martial.

Quid ſi me tonſor, dum curva novacula ſupra eſt,
Tunc libertatem divitiaſque roget?

Promittam, nec enim rogat illo tempore tonſor,
Latro rogat: res eſt imperioſa timor.
Sed fuerit curva quum tuta novacula theca:
Frangam tonſori crura, manuſque ſimul.
Epig. 11. v. 5.

Sect. CX.

Whether bodily conſtitution, habit, &c.

But ſeeing neither temperament, affections, propenſions, habits, nor external force, hinder the free exerciſe of the will (§ 54 & ſeq.) it is abundantly manifeſt, that neither bodily conſtitution, which hath ſo great an influence commonly on the affections of the mind, nor paſſions, however impetuous and vehement, nor habit, tho' become a ſecond nature, can hinder the imputation of an action; tho' ſometimes, in human courts, he be reckoned an object of juſt commiſeration, who was tranſported into a bad action by the violence of juſt grief, or any afflictive paſſion *.

* It is eaſier, as Ariſtotle has obſerved, to reſiſt luſt, or any voluptuous appetite, than the afflictive paſſions. See Nicomach. 3, 12. 3, 15. 7, 7. Mag. moral. 2. 6. The ſame is obſerved by Marcus Antoninus, ἐις ἑαυτόν, 2. 10. So that one cannot but wonder to find Ariſtotle, as if he had forgot himſelf, aſſerting, ad Nicom. cap. 2. "That it is more difficult to reſiſt the impulſes of pleaſure than of anger," ſince to be deprived of pleaſure is only a privative evil, and that only for the greater part but apparent, not real; whereas to feel pain is a poſitive, and very frequently a real ill. Who does not think parricide more to be imputed to Nero, who was not excited to that wickedneſs by any afflictive paſſion, but by mere cruelty and wickedneſs, than to Oreſtes, who giving the reaſon why he killed Clytemneſtra, ſays, *Now is ſhe who betrayed my father's bed killed.* Eurip. Oreſt. v. 937.

Sect. CXI.

Whether actions extorted by ſome are imputable?

Hence it is eaſy to ſee whether one be in any degree excuſable, who being overpowered by fear, to which the braveſt mind may ſuccumb, commits any action contrary to law. For if the fact be ſuch that there is no room to plead neceſſity, in vain is it pretended. But in what caſes neceſſity cannot be pleaded, we ſhall enquire more accurately afterwards.

* Truly, if any thing be commanded contrary to piety and juſtice, that then no pain or force ought to be yielded to, both the ſcriptures and reaſon teach. This is acknowledged by ſeveral Pagan writers. So Juvenal, § 8. v. 80.

Ambiguæ ſi quando citabere teſtis,
Incertæque rei: Phalaris licet imperat, ut ſis
Falſus, & admoto dictet perjuria tauro,
Summum crede nefas, animam præferre dolori,
Et propter vitam vivendi perdere cauſſas.

Sect. CXII.

When and how an action is imputed to the moral cauſe?

Whenſoever the underſtanding and will, and the phyſical motion of the body concur to an action, then he who does it is called *the phyſical cauſe of the action*; but if the mind alone acts without any corporeal motion, he is called *the moral cauſe*. Since therefore underſtanding and will are the only principles of human actions (§ 30), hence it follows, that an action is no leſs imputable to the *moral cauſe* than to the *phyſical cauſe*, if the concurrence of the will and underſtanding in both be equal; more imputable to the *moral* than to the *phyſical cauſe*, if one induces another, who is under obligation to obey him, to act, by commanding or compelling him; leſs imputable to the *moral* than to the *phyſical cauſe*, if one concurs with the action by advice or approbation only *.

* Hence that diſtinction of Hen. Koehlerus, in his Exercit. juris natur. § 108. & ſeq. between *efficacious will*, when the effort is ſufficient to produce or ſuſpend the action, and *inefficacious will*, when the effort alone is not ſufficient, is to be admitted as of great uſe: wherefore, if the will of the moral cauſe be *efficacious*, the action is juſtly imputed to him; and in proportion as the will is more or leſs ſuch,

the action is more or leſs imputable to one. For who doubts, for inſtance, that if a father command his ſon to ſteal, the theft is more imputable to him than to a ſtranger, either commanding or perſuading to do it?

Sect. CXIII.

Whether the condition of the agent contributes any thing toward imputability.

To the circumſtances of the perſon to whom an action is imputable (§ 105), belong his dignity, rank, and quality; and therefore it is indiſputable, that when many perſons concur in the ſame action, if the action be juſt it is leſs imputable, and if the action be unjuſt, it is more imputable to him whom relation, prudence, duty, age, dignity, ought to influence to good conduct, and reſtrain from bad, than to a ſtranger, an ignorant, ſtupid perſon, one under no particular tie, a boy, a ſtripling, or, in fine, a perſon of no rank or dignity.

* Thus, whatever good ſervice was done to a relative, the ancients called *a good office*, what was done to a ſtranger they called *a benefit*. Seneca de Benef. 3. 18. The latter is more imputable than the former. On the other hand, an injury done to a father by a ſon, whom filial duty ought to have reſtrained from ſuch a crime, is more imputable than one done by a ſtranger is to him. And who does not blame the faults committed by a prudent perſon well inſtructed in the thing, more than thoſe done by a ſtupid ignorant perſon: thoſe committed by a perſon of age and experience, or even by a man arrived at the years of diſcretion, than thoſe done by a youth: thoſe committed by a theologue ſkilled in ſacred matters, than thoſe done by an illiterate perſon: thoſe, in fine, committed by a perſon of diſtinction, or placed in any honourable ſtation, more than thoſe done by a vulgar perſon of lower life? So Hieronymus in Ezech. 2. Salvianus de gubern. Dei, p. 118. and ſo likewiſe Juvenal in theſe well known lines.

Omne animi vitium tanto conſpectius in ſe
Crimen habet, quanto, qui peccat, major habetur.
Sat. 8. v. 140.

Sect. CXIV.

Since, in the imputation of actions, regard ought to be had not only to the perſon of the agent, but to all the other circumſtances; but that concurrence of circumſtances in the object, of time and place, together with ſufficient abilities, without which an action cannot be done, is called *occaſion* or *opportunity*; it follows neceſſarily, that he is not excuſable whom occaſion tempts to commit any crime; nor he who loſes the opportunity of doing a good action thro' indolence or negligence; but an omiſſion of an action is not to be imputed to one who had no opportunity of doing it *.

Occaſion being wanting, the action is not imputed.

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* For the occaſion of committing a fault or temptation to it, ought to be avoided; and one ought to reſiſt the allurements of vice. He who does it not is blameable, if he yields to ſinful appetites or paſſions. He is therefore the author and cauſe of that action; and it ought to be imputed to him. It is therefore a wretched excuſe Chæreas offers for himſelf in Terence: "Should I loſe ſo deſirable, a ſo much longed for, ſo favourable an opportunity?" For he ſuffered himſelf to be tempted to ſin. On the other hand, how blameable the not taking hold of an opportunity of doing well is, Chriſt elegantly ſets forth to us in the parable of the ſervants, *Matt.* xxv. 14.

Sect. CXV.

Much leſs then can the omiſſion of theſe actions be imputed to one, which are either impoſſible in the nature of things, or contrary to laws and good manners, or at leaſt which he had not ſufficient ability to perform, except ſo far as one had weakened the abilities with which he was endowed by his own fault, or had raſhly, with bad intention, promiſed what he might have foreſeen to be impoſſible for him to perform.

Whether the omiſſion of things impoſſible can be imputed, or how and when?

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* Hence it is plain, why a debtor who had ſquandered his eſtate is ſtill liable, and is not excuſable on account of his indigence, becauſe he reduced himſelf by his own fault:

and why an alchymiſt, who had promiſed mountains of gold, when he was found to have deceived, was as juſtly condemned of fraud, as one who had knowingly, and with evil intention promiſed a treaſure. See an example in Tacitus, Annal. 16. 1. in the ſtory of Ceſellius Baſſus.

Sect. CXVI.

What actions are good, and what are evil?

Moreover, actions compared in this manner with a rule of action, take different names. If they, in all their circumſtances, be agreeable to right reaſon, not obliging by external obligation, or to internal obligation merely (§ 7), they are *good*; but if in one or more circumſtances they deviate from right reaſon to whatever ſide, they are *bad*. From which definitions it follows, hatt an action muſt be both materially and formally good (as the ſchools ſpeak) in order not to be claſſed with bad actions *.

* Hence the largeſſes, the faſtings, and all the auſterity of the Phariſees were not good actions, tho' *materially* conformable to right reaſon, becauſe not done from a good motive, but from oſtentation and vain-glory. We ought not only to do good things, but we ought to do them in a right manner. The juſt man is rightly deſcribed by Philemon in Stobæus, Serm. 9. thus: "Not he who does good things in whatever manner he does them, but he who ſincerely deſires not merely to be thought, but really to be upright in all his conduct, is good."

Sect. CXVII.

What actions are juſt, and what are unjuſt?

Again, if we compare actions with a law, thoſe which are in all things agreeable to law are *juſt*; thoſe which are, in any one circumſtance, diſagreeable to law, are *unjuſt*, and are therefore called *ſins*. Whence we may learn why St. *John* places all ſin in *ανομια*, *i. e.* a tranſgreſſion of a law.

Sect. CXVIII.

The difference between juſt and honeſt

Finally, ſince the divine law or will obliges us to *love* (§ 79), and love is either love of *juſtice*, or love of *beneficence* (§ 82), an action agreeing in all circumſtances with the love of juſtice, is a *juſt action*, and one ever ſo little repugnant to it, is an *unjuſt action*; but thoſe which proceed from the love of humanity and beneficence, are called *honeſt*, and thoſe which are not agreeable to that love, are called *diſhoneſt*, *baſe*, *inhumane*; and hence it is eaſy to underſtand wherein the difference lies between *expletive* and *attributive juſtice*.

actions, and between unjuſt and diſhoneſt actions.

REMARKS on this Chapter.

Our Author's poſitions concerning the interpretation of laws, and the imputation of actions *in foro humano*, are very clear and juſt. But it may not be improper to add the following obſervations concerning the effects of ignorance and error *in foro divino*, *i, e.* with reſpect to the good and bad conſequences of actions occaſioned by ignorance or error, according to the laws of God in his government of the world.

1. It muſt be as true in morals as it is confeſſed to be in mechanics, that deviation from truth will lead into a wrong manner of acting; and all action muſt be liable to all the conſequences of the laws of nature, *i. e.* to all the conſequences connected with it in the regular and wiſe conſtitution of things, according to which every cauſe operates, means are proper and effectual, and different operations have different effects. And in fact we know no miſtakes in action through ignorance, raſh judgments, or whatever way it happens, which do not produce hurtful conſequences; inſomuch that there is good reaſon to conclude, that more of the miſery of mankind is owing to wrong methods of action which are the effects of ignorance or error, than to any other cauſe. It muſt be true in general, that in a world governed by general laws; or in which connexions are invariably eſtabliſhed, every deviation from truth, every miſtake about the connexions of things in it, muſt be in ſome degree hurtful.

But, 2. Since all the intereſts of intelligent agents require government by general laws, or fixed connexions which operate invariably, the government of the world will be perfectly good, if the connexions or general laws which conſtitute it are the beſt adapted that may be, to promote the greater good of rational agents in the ſum of things. Now, that it is ſo, muſt be certain, if the being and providence of an infinitely good God can be proved *à priori*. And there is ſufficient reaſon to conclude that it is ſo *à poſteriori*, becauſe the more examples we find by enquiring into the government of the world, of ſuch good general laws, the greater is the preſumption that the whole is governed by the beſt general laws. But the further we enquire, the further we ſearch, the more and clearer inſtances do we find of good, of perfect government. See my *Principles of Moral and Chriſtian Philoſophy.*

3. Our great buſineſs therefore is to endeavour to acquire juſt notions of the connexions of things; or of the good and bad conſequences of actions, in order to act agreeably to them. If getting knowledge to direct our conduct were not in our power, directing our conduct could not be in our power: wherefore, if ignorance, want of knowledge, error, falſe notions or judgments be not imputable to us, wrong actions are not imputable to us. So that ultimately, whether we ſpeak of the imputation of actions in the juridical ſtile, or in other words, as we have now ſpoken of it, (both of which muſt mean the ſame thing) it is ignorance or error in judgment that is imputed, when action is imputed; it is ignorance or error that brings evil upon us, when wrong action does it; becauſe every action is directed by our preſent opinion and judgment, and the affection correſponding to it. And for that reaſon, our chief buſineſs, intereſt and duty, muſt be to have juſt or true ideas of the nature and conſequences of actions; or of the connexions of things, according to which our actions ought to be regulated, ſince it is according to them that actions have certain effects or conſequences.

4. Falſe judgments, which tend to direct into a wrong courſe of action, or to introduce a wrong temper into the mind, muſt, (as hath been ſaid) be hurtful. But, on the one hand, it is as ſure as that there is a God, and that the world is governed by good laws, for the greater general good of the whole, that a virtuous reaſonable temper, and virtuous reaſonable conduct, are, upon the whole of things, the moſt advantageous courſe of acting. It is ſo in fact in the preſent life conſidered by itſelf without any regard to futurity; and it muſt be ſo in a ſpecial manner in a future ſtate. And, on the other hand, it is as ſure as that there is a God, that no opinions, tho' falſe, which do not tend to corrupt the temper, or to lead into a wrong courſe of action, can render us obnoxious to the divine diſpleaſure, can be provoking to him, as ſuch, if the bent of the heart be ſincerely towards truth and right; or can as ſuch involve in any hurtful conſequences appointed to be puniſhments of falſe opinions, not tending to corrupt the temper, nor to lead to vitious behaviour; and not proceeding from want of love to truth and right in any degree, or from want of impartial, honeſt diligence, as far as that is in our power, to find out truth and avoid error.

How moral conſcience, or our ſenſe of right and wrong may be, and only can be impaired, corrupted, or overpowered, is explained at great length in the *Enquiry concerning virtue,* Characteriſticks, T. 2. p. 40, *&c.* And to improve it, and preſerve it pure and untainted, muſt be our chief duty and intereſt. Enquiries therefore into right and wrong conduct are of the utmoſt importance. They are enquiries into the natures and conſequences of things, and are in that ſenſe *philoſophy.* But which is more, they are enquiries into the natures and conſequences of things which ought to direct our conduct; and therefore they are *moral philoſophy*, or compoſe the ſcience of life, the ſcience of right conduct, the ſcience and art of living ſuitably to our nature and rank, ſuitably to our dignity; agreeably to the will of our Creator, manifeſted by the connexions of things eſtabliſhed by him; and agreeably to our own beſt intereſt. For this muſt be certain, that it is the eſtabliſhed connexions of things which conſtitute our beſt intereſt. And if the eſtabliſhed connexions of things be according to the beſt order, acting according to virtue or the beſt order, muſt be in the ſum of things our beſt intereſt. And why ſhould we doubt that it is really ſo in a future ſtate, and for ever, ſince it is really ſo at preſent, even while virtue is but in its firſt ſtate of education, culture and diſcipline; ſince the compleat natural effect of highly improved virtue cannot take place till virtue be brought to a great pitch of perfection by gradual culture, becauſe the effect cannot precede the cauſe. But that virtue is our beſt intereſt, as well as acting according to the beſt order, and eaſily diſcoverable to be ſuch, will appear as our author proceeds in his deduction and demonſtration of particular duties or virtues. I thought it proper to add this remark, as well on account of thoſe who ſpeak vaguely and looſely about the imputability of ignorance and error, as of thoſe who maintain opinions which reſult in aſſerting, That ſincere love of truth, and impartial diligence to diſcover it, is not the beſt temper, the beſt part we can act, nay, all the good within our power, with regard to knowledge, ſpeculative or practical. And if this be not the temper and conduct which leads to happineſs, according to the conſtitution of things, what a terrible, what a wretched conſtitution of things muſt it be!

CHAP. V.

Of the duties of man to God.

Sect. CXIX.

A Tranſition to the doctrine of duties.

HItherto we have but premiſed ſome of the firſt principles of the beautiful moral ſcience; let us now proceed to conſider the *offices* or *duties* which the *law of nature* preſcribes to mankind; to all and every one of the human race. What the Greek philoſophers called τὸ Δέον, and the Stoics τὸ καθῆκον, Tully afterwards, in explaining this part of philoſophy in the Roman language, called *officium*, not without deliberating about the matter a long time, and conſulting his friends *.

Sect. CXX.

Office or duty defined. By *office* or *duty* I underſtand an action conformable to the laws, whether of perfect or imperfect obligation. Nor can I entirely approve the definition given by the Stoics, who ſay, it is an action, for the doing which a probable reaſon can be given; or, in other words, an action which reaſon perſuades to do *. Diog. Laert. 7. 107. 108. Cicero de finibus, l. 3. 17.

That the Stoics called it τὸ καθῆκον, and held the doctrine of *duties* as the chief part of moral philoſophy, we are aſſured by Diogenes Laertius, who has not only briefly and clearly explained the chief precepts of the Stoics with relation to human duties, but has likewiſe commended their treatiſes on the ſubject, as that of Zeno, l. 7. 4. of Cleanthes, cap. 7. of Sphærus ibidem, &c. Plutarch mentions a book of morals by Chryſippus de repugn. Stoic. Cicero mentions one of Panætius upon duties (de off. 3. 2.) and in his letters to Atticus, 16. 11. he ſpeaks of one by Poſidonius. When, after their example, Cicero had wrote a treatiſe of the ſame kind in Latin, after long deliberation what title to give it, all things duly conſidered, he could not find a more proper word to expreſs the το καθῆκον of the Stoics than the Latin word *officium*. So he writes to Atticus, 16. 6. "Quod de inſcriptione quæris, non dubito, quin καθῆκον officium ſit, niſi quid tu aliud. Sed inſcriptio plenior *de officiis*.

* For ſince nothing is done even raſhly, for which a probable reaſon may not be given, whatever is done, not only by men, but by brutes, may be called *officium*, *office* or *duty*. And thus the Stoics underſtood the word, of whom Laertius ſays, l. 7. 107. "They extended the word to plants and animals, for with regard to theſe there are offices." It is true, an office ought to be founded upon a reaſon, but it ought to be a reaſon which is proper to determine men to act or forbear acting, and not brutes, i. e. an obligatory reaſon.

Sect. CXXI.

The nature of duty.

But ſince office or duty means an action conformable to law, it is plain that duty cannot be conceived without a law; that he does not perform a duty, who impoſes upon himſelf what no law commands; that an action ceaſes to be duty, when the law, or the reaſon of the law enjoining it ceaſes; and that when a law extends to certain perſons only, of two perſons who do the ſame action, the one performs his duty, and the other acts contrary to his duty *.

* It is proper to illuſtrate theſe propoſitions by examples. None will ſay that Origen did a duty when he emaſculated himſelf, whether by an inſtrument, as Hieronym. relates, ep. 65. or, as others have narrated, by medicines. Epiph. Haer. 64. For there is no divine precept commanding it, inſomuch that Origen himſelf afterwards acknowledged he had miſunderſtood that paſſage in St. Mat. xix. 12. See Huet. Origeniana I. 1. 13. p. 8. None will deny that a chriſtian would act contrary to his duty, if he ſhould not ſubmit to the law of circumciſion, or offer ſacrifice to God, tho' formerly both were duties, Gal. iii. 23, 25. iv. 3, 4, 5. 2 Col. ii. 20. Heb. ix. 9, 10. Finally, if a prieſt uſurps the office of a judge, he acts contrary to his duty, and is guilty of intruſion into a charge not committed to him; whereas a judge doing the ſame action, does his duty, 1 Peter iv. 15.

Sect. CXXII.

Duty divided into perfect and imperfect.

The obligation binding one to do his duty being either perfect or imperfect (§ 120), *duty* muſt likewiſe be divided into *perfect* and *imperfect*; the former being done in obedience to perfect obligation, or a law; the other being performed in conſequence of imperfect obligation, or from virtue *.

* Accordingly, to do hurt to no perſon, to fulfil contracts, to repair damage done by us, and ſuch like duties, are perfect. To relieve the indigent, give alms, ſhew

thoſe

thoſe who are gone out of their way the right road, give counſel to thoſe who are in doubt, and ſuch like duties, are imperfect. See Cicero de off. 3. 12. & ſeq.

Sect. CXXIII.

Into natural and chriſtian.

Further, law being the rule of duties (§ 121), becauſe law is either *divine* or *human*, and divine law is either *natural* or *poſitive*, there are ſo many correſponding diviſions of duties. Thoſe which are commanded by the divine natural law, are called *natural duties.* Thoſe commanded by the divine poſitive law, are called *chriſtian duties*; and thoſe, in fine, which are enjoined by human laws, are called *civil offices* or *duties* *.

* To worſhip God with religious reverence, to honour our parents, to defend ourſelves againſt injuries, are *natural duties*, l. 2. l. 3. Dig. de juſt. & jure: To deny ourſelves, take up our croſs, and follow Chriſt, are *chriſtian duties*: to pay civil taxes, to obſerve particular forms and times in law-ſuits, and ſuch like, are *civil duties.*

Sect. CXXIV.

Into duties to God, to ourſelves, and to others.

But the principal diviſion of duties is taken from their object. For as there are three objects to whom we owe certain duties, GOD, *ourſelves*, and *other men* (§ 90), ſo there are duties of three kinds; *duties to God*, *duties to ourſelves*, and *duties to other men*; of all which we are to treat in order.

Sect. CXXV.

The foundation of our duties towards God.

As to our *duties towards God* we have already obſerved, that they muſt be inferred from the conſideration of the divine perfections (§ 87); and hence we concluded, that God ought to be loved with a love of *devotion and obedience*; and therefore ought to be worſhipped with all the powers of our ſoul, as the moſt perfect of Beings, upon whom we wholly depend, and to be obeyed with the moſt ſincere and perfect obedience (§ 91).

Sect. CXXVI.

Our obligation to know God.

Since the duties we owe to *God* muſt be deduced from his infinite perfections (§ 125), it follows, by neceſſary conſequence, that man is obliged not only to acquire the moſt lively knowledge of God, and of his perfections, but daily to encreaſe this knowledge, and advance in it, that he may attain daily to greater and greater certainty and perfection in it; which, ſince it cannot be done but by daily meditation upon thoſe truths which reaſon is able to diſcover concerning God, by the careful and ſerious contemplation of his works of creation and providence, ſo full of evident marks of his infinite wiſdom and goodneſs; hence it is manifeſt that we are obliged to theſe exerciſes, and that thoſe who neglect theſe means of coming to the knowledge of God, which are in every one's power who has a ſound mind, are in a ſtate of inexcuſable ignorance; and thoſe who aſcribe any imperfection to God, are in a ſtate of inexcuſable error (§ 107) *.

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* Hence the apoſtle ſays what may be known of God is manifeſt to the Heathens, becauſe the inviſible perfections of God from the beginning of the world are clearly diſcovered by his wonderful works, and therefore they are without excuſe who know him not, Rom. i. 20. And whence elſe indeed that univerſal conſent in the acknowledgment of his being and perfections urged by Cicero, Qu. Tuſc. 1. 13. de nat. deorum, 2. 2. Maxim. Tyr. diſſ. 38. Ælian. Var. hiſt. 2. 31. Sen. ep. 117? For tho' this univerſal conſent be not a demonſtrative argument of the Being of God (§ 71), yet hence it is manifeſt, that as the apoſtle ſays, "What may be known of God is eaſily diſcoverable." For which reaſon, Cicero de nat. deorum, 2. 2. affirms, "If any one doubt whether there is a God, I cannot comprehend why the ſame perſon may not as well doubt whether there be a ſun or not."

Sect. CXXVII.

And to have juſt apprehenſions of his perfections.

Hence it likewiſe follows, that we are obliged, or that it is our duty to have juſt apprehenſions of the divine perfections, and to know and believe that he is the Creator and Governor of all things, that all things are made by him, and are under his providence and government, human affairs principally; and that he is one *pure*, *eternal*, *independent*, *omnipotent*, *incomprehenſible*, *intelligent*, *wiſe*, *omniſcient*, *free*, *active*, *good*, *true*, *juſt*, and moſt *excellent Being*[*].

[*] Epictetus Enchirid. c. 38. tells us, "The chief thing in religion is to have juſt ideas of the immortal powers, and of their infinitely wiſe and good adminiſtration." And they are in a great error indeed, who think that the whole of our duty conſiſts in probity and integrity, of life, and that it is a matter of indifference what one thinks of God, or what notions he entertains of divine things. For ſince our duties to God can only be inferred from his perfections (§ 125), how can one render to God the homage and reverence due to him, or that ſincere and univerſal obedience to which he is juſtly entitled, if he be ignorant of his perfections, or has imbibed falſe and corrupt notions of them?

Sect. CXXVIII.

All impiety and blaſphemy are inexcuſable.

He who obſtinately denies the being, or any of the perfections of God, is *impious*: he who aſcribes imperfections to God, repugnant to his nature, is called a *blaſphemer*: ſince therefore they, who do not know the perfections of God, are inexcuſably ignorant, and they, who attribute any imperfection to him, inexcuſably err; it is incontrovertible that all *blaſpheming* and *impiety* are inexcuſable. But they are therefore *impious*, and without excuſe, who, with a hardened mind, deny the divine exiſtence or providence; and they are *blaſphemers*, who, with *Homer*, and other poets, aſſert a plurality of Gods, and repreſent them as contending and quarrelling one with another; as adulterers, inceſtuous, or deformed, lame, in pain, and groaning in an effeminate manner; and who have not only profeſſed in words ſuch abſurd opinions of the Gods, but have not heſitated to ſet them forth to the eyes of men under horrible images, and by wicked and vile ceremonies *.

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* The ancient writers of apologies for the chriſtian religion have ſeverely reproached the Pagans for this impiety and blaſphemy, as Juſtin Martyr, Athenagoras, Theophilus Antiochenus, Tatianus, Hermias, Tertullian, Cyprian, Minucius Fælix, Arnobius, Lactantius, Euſebius, Julius Firmicus Maternus, and others. But which is more ſurprizing, ſome Pagan authors have likewiſe reproved this madneſs of their cotemporary countrymen. Not to quote ſeveral paſſages of Lucian and other Heathen writers to this effect, I ſhall ſatisfy my ſelf with mentioning one of Sophocles preſerved to us by Juſtin Martyr Paræneſ. ad Græc. p. 17. and de monarchia Dei, p. 104, and by Euſebius, Præp. Evang. p. 348, and ſome others. "In truth, there is one God who made heaven and the ſpacious earth, the ebbing and flowing ſea, and the mighty winds. But many of us having loſt our underſtanding, for a conſolation in our calamities, make to ourſelves Gods, and endeavour to propitiate lifeleſs images by ſacrifices to them: we celebrate feſtivals fooliſhly, imagining ourſelves pious in ſo doing." Is it not truly wonderful to find Sophocles reproaching his fellow Pagans for the ſame impiety the apoſtle charges them with, Rom. i. 21, 22, 23.

Sect. CXXIX.

Our obligation to promote the glory of God.

He who has a juſt and lively notion of any perfections, cannot but be highly delighted with the contemplation of them, and will ſpare no pains to perſuade others to pay the ſame regard to the Being poſſeſſed of them; it is therefore our duty to endeavour to bring others to the knowledge of the divine perfections, and to reſtore thoſe who err to a right apprehenſion of them; and, as much as in us lies, to convince the impious, by ſolid and perſuaſive reaſoning with them, of their abſurdity and wickedneſs, and bring them to render due reverence to God: and they who do ſo, are ſaid to exert themſelves *to promote the glory of God.*

* I have ſaid by ſolid and perſuaſive arguments, not menaces and penalties. For ſince ignorance and error are vices not of the will, but of the underſtanding, there is no other remedy for them, but to convince perſons of the truth, and to excite them by proper arguments to embrace it: and hence it is evident, that thoſe can never be ſerviceable to the ignorant or erring, who are for employing fire and gibbets againſt atheiſts, eſpecially ſince it hath never been an uncommon practice to brand with that name (to uſe the words of Clemens Alex. in Protrept.) " men living regularly and modeſtly, who were quicker-ſighted in diſcerning impoſtures about the Gods than the generality of mankind." Of this many examples are brought by the learned. See Ælian. Var. Hiſt. 2. 31.

Sect. CXXX.

And to the love of God.

Becauſe he who has a juſt conception of the divine perfections, cannot but highly delight in them (§ 129), and the deſire of good to an object, with delight ariſing from the conſideration of its perfection and happineſs, is *love* (§ 8), the conſequence is, that God muſt be loved. And becauſe of the more excellent and ſublime a nature a Being is, the more love and veneration is due to it (§ 87): God ought to be loved with the moſt perfect love; *i. e.* as the ſcripture expreſſes it, " with all our heart, with all our ſoul, and with all our ſtrength," Mat. xxii. 37. Luke x. 27. Becauſe goodneſs is one of the divine perfections (§ 127); God is in himſelf, and with regard to mankind, infinitely good: he is therefore to be loved for both theſe reaſons *.

* What the Epicurean philoſophers and the Sadduceans in ancient times ſaid of the pure love of God, is well known to the learned: And in our own times, ſome myſtick divines have renewed that doctrine, the chief of whom is Franc. Saignac de Fenelon, Archbiſhop of Cambray,

bray, whoſe treatiſe entitled, "The maxims of the ſaints," gave riſe to a controverſy, of which I have elſewhere given a ſhort hiſtory (Elem. Philoſ. moral. § 198). But who can conceive God otherwiſe than as good to all his creatures? How idle then is the queſtion about the pure love of God? nay, how dangerous? This hath been ſhewn by Leibnitz, in Præf. prodrom. & mantiſſæ codicis juris gentium, by Wolſius and others.

Sect CXXXI.

And likewiſe obedience and fear.

Among the divine perfections are omnipotence and omniſcience (§ 127); but none can keep theſe perfections in view without being excited to the diligent, unintermitted ſtudy of doing whatever may be pleaſing to God, and of avoiding whatever may be diſagreeable to him; which ſtudy and endeavour we call *obedience* to God. And ſince none can repreſent God to himſelf as a moſt juſt Being, without being ſeriouſly concerned not to offend him; not to do or ſay any thing that is diſhonourable to him, or tends to create his diſpleaſure; it muſt be our duty to *fear* him: for this concern not to incur his anger is *fear*, and when united with the love of him above deſcribed (§ 130), it is properly called *filial fear* *.

* *Filial fear*, is therefore attended with love, and *ſervile fear* with hatred: it excludes love. But ſince it is our duty not only to fear God, but likewiſe to love him (§ 130), the conſequence is, that the law of nature requires *filial* not *ſervile fear* of God, the latter of which wicked men and evil ſpirits cannot ſhake off.

Sect. CXXXII.

As alſo to avoid ſuperſtition.

He who fears God with a ſervile fear, ſeparates the love of God from the fear of him (§ 131); but becauſe love of God conſiſts in delight in the conſideration of the divine perfections (§ 130); he therefore who fears God without any knowledge of his perfections, is called *ſuperſtitious*; and hence it follows, that a good man ought carefully to avoid all ſuperſtition, becauſe it proceeds from ignorant ſervile fear *.

* *Superſtition* is fear of God, which reſults not from the contemplation of the divine perfections, but from falſe conceptions of God. This is Theophraſtus's meaning, Charact. p. 47, where he defines ſuperſtition, "Δειλίαν πρὸς τὸ δαιμόνιον, a trembling dread of the Divinity." By Δειλίαν, Caſaubon in his notes underſtands fear different from that which becomes good men who have juſt ideas of the Deity; and by τὸ δαιμόνιον, the Gods and Demons, and whatever in times of ancient ignorance was thought to have any ſhare of Divinity. This abſurd dread, as it is in the mind, is called *internal ſuperſtition*, and as it diſcovers itſelf in outward acts, it is called *ſuperſtitious worſhip*.

Sect. CXXXIII.

Its effects. All ſuperſtition, internal and external, being inconſiſtent with juſt apprehenſions of the divine perfections (§ 132), one who has juſt notions of them, will keep himſelf carefully from all ſlaviſh fear of created beings, and from thoſe abſurd errors, whereby God is repreſented as avaritious and placable by gifts; and likewiſe from magical arts and divinations, from idol-worſhip; and, in fine, from this abſurd opinion, that God may be propitiated by mere external worſhip,, tho' not accompanied either with internal fear or love.

* Theſe are the principal branches of *ſuperſtition*, to which all its other effects may be reduced. See Budd. de Super. & Atheiſmo, cap. 7 & 8. Hence it appears how idle the compariſon between *ſuperſtition* and *atheiſm* is, both being equally repugnant to true piety, as the ſame learned writer has proved againſt Bayle, cap. 4. § 5. None however will deny, that very many great evils proceed from *ſuperſtition*, inſomuch that there is reaſon to cry out with the Poet,

Quantum religio poſſit ſuaſiſſe malorum.

If by *religio* be meant the *dread of God*, disjoined from *love*, i. e. *ſuperſtition*. Upon this ſubject Juvenal's fifteenth ſatyr is well worth our reading. For it often happens, that as the Poet there ſays,

Inter finitimos vetus atque antiqua ſimultas,
Immortale odium, & nunquam ſanabile vulnus.
Ardet adhuc Ombos & Tentyra. Summus utrimque
Indo furor vulgo, quod numina vicinorum
Odit uterque locus, quum ſolos credat habendos
Eſſe Deos, quos ipſe colit.

Sect. CXXXIV.

And to repoſe our truſt in God.

Further, ſince none can repreſent the divine perfections to himſelf without preſenting to his mind the ideas of perfect wiſdom, power and goodneſs; ſuch a perſon cannot but place his confidence and truſt in God, and be ſatisfied in his mind with the divine adminiſtration; and thus be diſpoſed to ſubmit to whatever may happen to him in the courſe of divine providence with a firm and cheerful ſoul; nor will he be ſtumbled becauſe evils fall upon the good, and good things fall to the ſhare of the wicked, but be perſuaded that all things ſhall co-operate to the good of the virtuous, to good in the whole.

Sect. CXXXV.

Of internal and external worſhip.

In theſe and the like offices does that *internal worſhip* of God conſiſt, by which we underſtand the love, fear and truſt, with which we embrace God in our pure minds. But man being ſo framed, that his affections naturally exert themſelves in certain external actions, his internal love of God could not be thought ſincere unleſs it exerted itſelf in *external love*; *i. e.* in ſuch external acts as expreſs love, fear, and reſignation towards God *.

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* Some have denied that the neceſſity of external worſhip can be proved from principles of reaſon, partly, becauſe God does not ſtand in need of it; (as the philoſopher Demonax in Lucian, in Demonacte, tom. 1. p. 861, aſſerts, when being accuſed of impiety, for not offering ſacrifice to Minerva, he anſwered, " I did not think ſhe ſtood in need of ſacrifice.)" Partly becauſe human ſociety, and the tranquillity of human life, is not hurt by the omiſſion of external worſhip: (See Thomaſius, Juriſprud.

divin. 2. 1. 11. and his introd. in Ethic. 3. 37. & ſeq.) But neither does God ſtand in need of internal worſhip, which none will deny to be a duty. And the other argument falls to the ground, when that fundamental error is refuted, which aſſerts that nothing is of the law of nature but what can be inferred from ſociability (§ 75.) See Hochſtet. Colleg. Puſend. Exercit. 3. 38.

Sect. CXXXVI.

External worſhip ought to flow from the love of God.

Since therefore the external worſhip of God conſiſts in actions flowing from love, fear, and reſignation towards God (§ 135), but love muſt naturally exert itſelf in praiſing the Being in whoſe perfection and happineſs we highly delight, it muſt be our duty always to ſpeak honourably of God, and with due reverence, and to excite others by our actions to love him, to ſing praiſes to him, and not to diſhonour his name by raſh ſwearing, by perjury, or by whatever irreverent diſcourſe.

Sect. CXXXVII.

As alſo from the fear of God.

From the fear and obedience we owe to God as the moſt perfect of Beings, we may juſtly conclude that all our actions ought to be conformed to his precepts, and that we ought always to have in mind his omnipreſence and omniſcience, by which he diſcerns our moſt ſecret thoughts; whence it follows, that all hypocriſy and diſſimulation ought to be avoided, as being neceſſarily accompanied with injurious and contemptible apprehenſions of God.

* Thales Mileſius, acknowledged this ſublime truth, when being asked, " whether God ſaw unjuſt actions," he anſwered, " yea and unjuſt thoughts likewiſe," Clemens Alexand. Strom. 5. p. 594. But who can chooſe but fear an omnipotent God, who knoweth and ſeeth all things? Epictetus ſays elegantly in Arrian, " Wherefore, doors and windows being ſhut, or when you are in darkneſs, ſay not you are alone; for you are not. And you certainly are not, becauſe God is preſent." We are therefore under the ſtrongeſt obligation to ſincere piety, ſince we are always in the ſight of God.

Sect.

Sect. CXXXVIII.

Confidence ought to be placed in God.

In fine, he who places his truſt in God (§ 134), will never ceaſe to ſend up pure devout prayers to him, and will cheerfully embrace every occaſion of ſpeaking well of and with God privately and publicly. For this is what right reaſon preſcribes concerning the external worſhip of God. As for the external rites, it is likewiſe obvious, that public worſhip cannot be performed unleſs certain times and places be devoted to it; and a duty of ſuch importance ought to be done with all decency; but as to the rites or ceremonies themſelves, reaſon can lay down no other rule about them, but in general, that they ought to be in every reſpect ſuch as are proper to recal to our minds thoſe ſentiments in which divine worſhip conſiſts.

REMARKS on this Chapter.

I have but little to add to what our Author hath ſaid of Religion. Our Harrington juſtly lays down the following truths relative to religion as aphoriſms. "Nature is of God: ſome part in every religion is natural; an univerſal effect demonſtrates an univerſal cauſe; an univerſal cauſe is not ſo much natural, as it is nature itſelf; but every man has either to his terror or his conſolation, ſome ſenſe of religion: man may therefore be rather defined a religious than a rational creature; in regard that other creatures have ſomething of reaſon, but there is nothing of religion." So we frequently find ancient philoſophers reaſoning about human nature and religion, as I have ſhewn from ſeveral authorities in the 7th chapter of my *Principles of Moral Philoſophy*, the whole of which treatiſe is deſigned to be a demonſtration *à poſteriori*, *i. e.* from the wiſdom and goodneſs of providence, that the whole world is made and governed by an infinitely perfect mind, in the contemplation, adoration and imitation of whom the chief happineſs of man conſiſts, according to his make and frame. The arguments, *à priori*, for the proof of a God, are ſhewn in the concluſion of that eſſay not to be ſo abſtruſe as is ſaid by ſome; and they are more fully explained in my *Chriſtian Philoſophy*. The end, the happineſs, the duty of a Being (all which ways of ſpeaking muſt mean the ſame thing) can only be inferred from its frame and conſtitution, its make and ſituation. But nothing can be more evident than, "That man is made to love order, to delight in the idea of its univerſal prevalence throughout nature, and to have joy and ſatisfaction from the conſciouſneſs of order within his own breaſt, and in the conduct of his actions." All the joys of which man is ſuſceptible, which never nauſeate or cloy, but are equally remote from groſſneſs and diſguſt, or remorſe, may be reduced to the love of order and harmony: nothing elſe can give him any pleaſure in contemplation or in practice, but good order; the belief of good adminiſtration in the government of the world; the regular exerciſes of thoſe generous affections which tend to public good; the conſciouſneſs of inward harmony; and the prevalence of good order and publick happineſs in ſociety, through regular and good government: to theſe claſſes are the principal pleaſures for which man is framed by nature, reducible, as might be ſhewn, even from an analyſis of the pleaſures belonging to refined imagination or good taſte in the polite arts: but whence ſuch a conſtitution? Does it not neceſſarily lead us to acknowledge an infinitely perfect author of all things; an univerſal mind, the former and governor of the univerſe, which is itſelf perfect order and harmony, perfect goodneſs, perfect virtue? Whence could we have ſuch a make? whence could we have underſtanding, reaſon; the capacity of forming ideas of general order and good, and of delighting ſo highly in it, but from ſuch a Being? Thus the ancients reaſoned. Thus the ſacred writers often reaſon. And this argument is obvious to every underſtanding. It is natural to the mind of man. It is no ſooner preſented to it than it cleaves to it, takes hold of it with ſupreme ſatisfaction, and triumphs in it. And what part of nature does not lead us naturally to this conception, if we ever exerciſe our underſtanding, or if we do not wilfully ſhut our eyes? But having fully enlarged upon this and ſeveral other arguments for the Being of a God in my *Principles of Moral Philoſophy*; I ſhall here only remark, 1. That Polybius, Cicero, and almoſt all the ancients, have acknowledged that a public ſenſe of religion is neceſſary to the well-being and ſupport of ſociety: ſociety can hardly ſubſiſt without it: or at leaſt, it is the moſt powerful mean for reſtraining from vice, and promoting and upholding thoſe virtues by which ſociety ſubſiſts, and without which every thing that is great and comely in ſociety, muſt ſoon periſh and go to ruin. 2. That with regard to private perſons, he who does not often employ his mind in reviewing the perfections of the Deity, and in conſoling and ſtrengthening his mind by the comfortable and mind-greatning reflexions to which meditation upon the univerſal providence of an all-perfect mind, naturally, and as it were neceſſarily lead, deprives himſelf of the greateſt joy, the nobleſt exerciſe and entertainment the human mind is capable of; and whatever obligations there may be to virtue independent of, or abſtract from ſuch a perſwaſion, he cannot make ſuch progreſs in virtue, he cannot be ſo firm, ſteady and unſhaken in his adherence to it, as he who being perſuaded of the truth juſt mentioned, is daily drawing virtuous ſtrength and comfort from it. This is fully proved by an excellent writer on morals, who, notwithſtanding hath been often moſt injuriouſly reproached for aiming at a ſcheme of virtue without religion. This author hath fully proved that the perfection and heighth of virtue muſt be owing to the belief of a God; ſince, where the latter is wanting, there can neither be the ſame benignity, firmneſs or conſtancy; the ſame good compoſure of the affections, or uniformity of mind, Characteriſtics, T. 2. p. 56, &c. 3. I would remark, that the being and providence of an univerſal, all-perfect mind, being once eſtabliſhed, it plainly follows from hence, by neceſſary conſequence, that all the duties of rational creatures may be reduced to this one, with ſeveral antient moraliſts, *viz.* "to act as becomes an intelligent active part of a good whole, and conformably to the temper and character of the all-governing mind." This is acting agreeably to nature; to the nature of an intelligent creature endued with active powers, a ſenſe of public good and order; agreeably to the nature of the Supreme Governor of all things, and to the order of his creation and government. All our duties may be reduced to, or comprehended under that one general article of acting as becomes an intelligent part of a good whole: for to do ſo, we muſt delight in the author of the world, and reſign to his will cheerfully the management of all things independent of our will; and by our will cheerfully co-operate with him in the purſuit of publick good, as far as we are active and have power, or as things are made by him dependent upon our will and conduct. He who is incapable of receiving pleaſure from the belief of a God, and the contemplation of general order and harmony, muſt be a very imperfect creature: for he wants the nobleſt of ſenſes or faculties. And he who can delight in the contrary perſuaſion, *i. e.* in the idea of a fatherleſs world and blind chance, or, which is yet more horrible, malignant adminiſtration, muſt have a very perverted mind, if perverſion has any meaning: he muſt be as properly a monſter, in reſpect of a moral frame, as any deformity is monſtrous in regard to bodily texture.

CHAP. VI.

Of the duties of man to himſelf.

Sect. CXXXIX.

Man is obliged to love himſelf.

NOthing is nearer to man, beſides the ever-bleſſed God, than he is to himſelf; nature having inlaid into his frame ſuch a ſenſibility to his intereſts, and ſo tender a love of himſelf, that we juſtly look upon him to be out of his ſenſes and diſtracted, who hates and wiſhes ill to himſelf. Nor is this *ſelf-love* unjuſt, while it does not diſturb good order. For it is that love with which one delights in his own perfections and happineſs, and is concerned to procure and augment theſe goods. But ſince God hath created us, and adorned us with many excellent perfections, and given us the means of improving in perfection and happineſs, he muſt be concluded to will that we ſhould endeavour to promote our happineſs and perfection, and be delighted with it; *i. e.* that we ſhould love our ſelves (§ 92).

Sect. CXL.

What this love is.

From which we have already inferred (§ 92), that man is bound to purſue, promote, and preſerve his own perfection and happineſs, as far as is conſiſtent with the love of the ſupreme Being *.

* Therefore, we do not perform theſe duties to ourſelves that we may be happy (for we have ſhewn above, that this tenet is falſe, that utility is the only ſource or rule of juſt and unjuſt) but becauſe God wills that we ſtudy to promote our happineſs and perfection: and therefore to promote our perfection and happineſs is itſelf our duty; and is not the cauſe which impels or obliges us to it.

Sect. CXLI.

What are its objects.

Since man is obliged, by the will of God, to all and every thing which tends to promote, preſerve, and enlarge his happineſs and perfection (§ 140); and man conſiſts, not only of mind, but of body likewiſe, in ſuch a manner, that he is a compound of *body* and *mind*; the conſequence is, that man is obliged to promote the perfection of both his conſtituent parts; and becauſe the faculties of the mind are two, *underſtanding* and *will*, he is obliged to ſtudy the perfection of both; wherefore the duties of man, with reſpect to himſelf, are relative partly to the *whole man*, partly to the *underſtanding*, partly to the *will*, and partly to his *body* and *external ſtate* *.

* It is proper to obſerve this, in oppoſition to the doctrine of Socrates and others, who maintained that the body is not a part of man, but his inſtrument only, and that external things do not properly appertain to man, or in the leaſt concern him. So Simplicius, in his preface to his commentary on Epictetus, "If a man commands his body, and the body doth not ſo much as command itſelf, then man is not body, and for the ſame reaſon, he is not both mind and body, but wholly mind." Whence he a little after reaſons thus: "He who beſtows his care upon the body, beſtows it upon things which belong not to man, but his inſtrument: But he, whoſe ſtudy and cares are ſet upon riches, and ſuch like external things, beſtows his care neither upon man, nor his inſtrument, but upon things ſubſervient to that inſtrument." Many other ſuch fooliſh boaſts we find in ſome ancient writers, which are equally falſe and hurtful.

Sect. CXLII.

Theſe duties ought not to be ſevered.

Whence we conclude, that theſe duties ought not to be ſevered from one another; and therefore, that neither the mind nor the body ought totally to be neglected: but if it ſhould happen that the duties due to both cannot be performed, we ought, of many perfections and goods, which cannot be obtained at one and the ſame time, to chooſe the moſt excellent and neceſſary (§ 94). And therefore the mind being more excellent than the body, we ought to be more diligent about the perfecting of our minds than our bodies, yet ſo as not to neglect the latter *.

* They therefore act contrary to their duty, who are ſo taken up about the body that they ſuffer their mind, as it were, to brutalize. But, on the other hand, they do not fulfil the whole of their duty, who impair their bodies by their too ſedulous uninterrupted application to the culture of their minds in knowledge and wiſdom. Neither of theſe duties is to be neglected.

Sect. CXLIII.

Man is obliged to preſerve his life and eſchew death.

As for what relates to the *whole man*, as conſiſting of ſoul and body, his felicity and perfection as ſuch, conſiſts in this, that the union of his mind and body be ſafe, becauſe theſe parts being ſeparated, tho' the mind, being immortal, ſurvive, yet the man no longer ſubſiſts. Man therefore is obliged to take care to preſerve his life, and to avoid the diſſolution of the union between his body and mind, which is death, unleſs the mind be perſuaded of a greater good to be obtained by death: in which caſe one ought not indeed voluntarily to chooſe death, but to ſuffer the menaces of it and itſelf with a brave and intrepid magnanimity *.

* There is reaſon therefore to pronounce Hegeſias πειθιθάνατος, to have been mad, who thought man obliged to put an end to his life, and went about urging men to deſtroy themſelves, by ſo many arguments that his hearers threw themſelves in great numbers into the ſea. Cic. Tuſc. 1. 34. Valer. Max. 8. 9. For if it be true, that one muſt be diſtracted and out of his ſenſes to hate himſelf (§ 139), we muſt ſay of Hegeſias's doctrine and conduct with a poet on another occaſion,

Non ſani eſſe hominis, non ſanus juret Oreſtes;

eſpecially, ſince he reduced all human obligations to pleaſure, and admitted not of a future exiſtence, from which any conſolation could be drawn to make death more deſirable than an afflicted life. On the other hand, the apoſtle's deſire was not contrary to his duty, when he *longed to be diſſolved*: nor are the martyrs to be blamed, who, ſupported by the hopes of immortal glory after death, feared no tortures; becauſe an evil which delivers us from a greater one, and procures us a very great good, is rather to be accounted good than ill.

Sect. CXLIV.

And therefore ſelf-murder is unlawful.

Hence moreover we infer, that he acts contrary to his duty who lays violent hands on himſelf. And this may be proved from other conſiderations, as, that this action is repugnant to the nature of love, and to a right diſpoſition of mind, and therefore involves an abſurdity or contradiction in it; that it is inconſiſtent with that truſt and reſignation which are due to God, and that acquieſcence in the divine will, which we have already ſhewn to be commanded by the law of nature (§ 134). But it will be ſufficient to add this one argument. Man is obliged to love man as himſelf; and therefore himſelf as others (§ 93). But the love of juſtice does not permit us to kill a man, therefore ſelf-love does not permit us to deſtroy ourſelves *.

* Thus we ought to reaſon with thoſe who are capable of reaſoning; as for thoſe who are furious and out of themſelves, the fatal action is not to be imputed to them (§ 106). Nothing can excuſe ſelf-murder but madneſs: not a guilty conſcience, ſince there are means of quieting it, *viz.* by reformation: nor the greateſt diſtreſs and pain; for tho' it be true, that of two evils the leaſt ought to be choſen; yet voluntary ſelf-murder is not a phyſical but a moral evil, which cannot be choſen; and no calamity or pain is ſo great, but it may be alleviated by reſignation to the divine will: let me add, that it is not the leaſt ſpecies of madneſs to die for fear of dying. See Wolf. Philoſoph. Moral. § 340 & ſeq.

Sect. CXLV.

So is the neglect of life and health.

From the ſame principles laid down (§ 143), it is evident that they act no leſs contrary to their duty who haſten their death by immoderate labour, or by luxury and laſciviouſneſs, or who do not take proper care of their health; and who, when neither duty calls, nor neceſſity urges, voluntarily expoſe themſelves to danger, and bring themſelves into peril or pain by their own fault.

* For whoever is the author or cauſe of an action, to him that action is juſtly imputable (§ 105). But who will call it into queſtion, that he is the cauſe of his death who deſtroys and tortures himſelf by exceſſive toil? he who wears out and waſtes the ſtrength of his body by riotous living? He who takes no care of his health, but expoſes

himſelf unneceſſarily to manifeſt dangers? Since therefore, even *in foro humano*, by the *Lex Cornelia*, not only he is guilty of murder, who with premeditated evil intention directly kills a man, but even he who was the cauſe of his death; (l. 16. § 8. Dig. de pœnis, l. 1. D. ad L. Corneliani de Sicar.) who can doubt but he muſt be guilty of ſelf-murder *in foro divino*, who was the cauſe of his own death?

Sect. CXLVI.

The duties of man with regard to his underſtanding.

The perfection of human *underſtanding* certainly conſiſts in the knowledge of truth and good; to acquire, enlarge, and preſerve which man being obliged (§ 140), the conſequence is, that every one is bound to exert himſelf to ſtrengthen and cultivate his underſtanding, or to improve his faculty of diſcerning truth from falſhood, and good from evil; and to let no opportunity paſs neglected, whether of inſtruction from others, from books, or from experience, of learning uſeful truths, and wholeſome precepts and maxims concerning good and evil *, that thus he may attain to all the uſeful knowledge within his reach; and if he be in that condition of life that does not allow him to learn all that it is uſeful to know, he may at leaſt be maſter of what it is moſt neceſſary and advantageous for him to underſtand, and have that at his command as ready coin, ſo to ſpeak.

* This knowledge is equally neceſſary to all men, partly becauſe the will cannot purſue but what the underſtanding repreſents to it as good, nor decline but what the underſtanding hath diſcerned to be evil (§ 30); and partly becauſe even actions done through ignorance are imputed, ſo far as the law might, and ought to have been underſtood (§ 108.) Sophocles therefore ſays with good reaſon in his Antig. v. 1321. "To have wiſdom is the principal thing with regard to happineſs."

Sect. CXLVII.

Of the particular culture to

From which laſt propoſition (§ 146), it follows, that whereas all perſons are equally obliged to the duties hitherto mentioned; every one is for himſelf in particular obliged to that ſpecial culture of his underſtanding, which is ſuitable to his particular talents and genius, and to his rank and condition in life; and therefore every one ought to know his force and genius, and one is hardly excuſable if he chooſes a way of life to himſelf for which he is not qualified, or if he forces any in his power*, under his authority, or committed to his direction, ſo to do.

which particulars are obliged.

* The culture therefore of our underſtanding, to which we are obliged, is either general, to which all men are equally bound, of which § 146; or ſpecial, of which in this ſection. The foundation of this diſtinction is, that all men have reaſon in common; but every particular perſon has his particular caſt and genius, his particular talents; underſtanding, memory and judgment not being common to all in the ſame degree. All men are therefore obliged to cultivate their reaſon, but all men are not equally well qualified for the ſame way of life, the ſame profeſſion and buſineſs. Whence we may, moreover, conclude, that an *internal ſpecial call* (if we ſet aſide divine inſpiration) is nothing elſe but the will of God concerning the particular kind of life one ought to chooſe, manifeſted to one by the gifts and talents with which he is endued, of which Perſeus ſpeaks, Sat. 3. v. 71.

Quem te Deus eſſe
Juſſit, & humana qua parte locatus es in re,
Diſce. ———

Sect. CXLVIII.

The perfection of the *will* conſiſts in the deſire and fruition of good. But ſince we cannot purſue good, unleſs we have firſt conceived a juſt notion of its excellence, nor avoid evil, unleſs we know it to be ſuch (§ 30); hence it is manifeſt, that we ought not to acquieſce in any knowledge of good and evil whatſoever, but exert ourſelves with all our power to have a true and lively conception of them; that not every good is to be choſen, but of many

Duties relative to the will.

many goods that which is beſt and moſt neceſſary: yea, that evil ought not to be avoided, if it be neceſſary to our attaining to a greater good: and finally, that our chief good ought to be deſired and purſued above all things; and that we ought to bear the want of other goods with a patient and ſatisfied mind, if we cannot attain it without being deprived of them *.

* They are therefore miſtaken, as we have already obſerved, who place our chief happineſs, which we ought to purſue in this life, in the enjoyment of all goods; as Plato in Cicero, Qu. Acad. l. 6. For becauſe ſuch enjoyment is above human power, and the condition of this life, the conſequence is, that we ſhould apply our endeavours to attain to our beſt and greateſt good, what our Saviour elegantly calls, " *τὴν ἀγαθὴν μερίδα*, the good part." Luke x. 42.

Sect. CXLIX.

The amendment of the will is chiefly neceſſary.

Further, ſince he who is obliged to the end, is likewiſe obliged to the means, it follows, that none of theſe means ought to be neglected which right reaſon ſhews to be neceſſary or proper for attaining to our greateſt happineſs; but that we ought to apply ourſelves with uninterrupted care daily to amend and perfect our minds, to obtain the right government of our affections, and to reſcue ourſelves from every vitious appetite and paſſion *.

* For theſe often ſo miſlead a man, that he falls ſhort of his end; is deprived of true happineſs, and makes a ſad ſhipwreck of it. Beſides, in general none can perform his duty aright who is not maſter of his paſſions and appetites, becauſe theſe ſo diſtort and pervert the judgment, that nothing can be done in order, or according to the right rule. Hence that excellent advice of the poet,

Ne frænos animo permitte calenti:
Da ſpacium, tenuemque moram, male cuncta miniſtrat
Impetus. Pap. Stat. Theb. l. 10. 626.

The caſe is this: " Reaſon, to which the reins are committed, is ſtrong, while it is undiſturbed by the affections;

but if theſe mix with it they darken and pollute it; it cannot govern or keep within due bounds what it cannot reſtrain or withdraw: the mind, when it is ſhaken and agitated by any paſſion, is a ſlave to it, and driven by it at its pleaſure." Seneca de Ira, v. 7.

Sect. CL.

Our obligation to preſerve and perfect our body.

It now remains to ſpeak of our *body*, the perfection of which conſiſts in the fitneſs of all its parts to perform their neceſſary functions; and it is plain that we are obliged to take care of our health, and therefore to direct our eating and drinking, labour, exerciſe, and every thing to that end; to the preſervation of our health, and the increaſe of our ſtrength and agility *; and, on the other hand, to avoid, as much as lies in our power, whatever tends to maim, hurt, or deſtroy our bodies, or any of its members, in any degree.

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* But in this every one ought to have regard to his rank and ſtation in life. For one degree and kind of vigour, agility and dexterity is requiſite in one ſtation, and another in another; one, *e. g.* to a wreſtler, another to an artiſt, another to a ſoldier, and another to a man of letters. Whence it follows, that the ſame kind of exerciſe is not proper to every perſon; and therefore that prudence ought to have its end before its eyes, and to chooſe means ſuited to it. Regard ought alſo to be had to different ages of life. "An old man, if he be wiſe, does not deſire the ſtrength of a young man, no more than a young man does that of a bull or elephant," ſays Cicero, Cato major. c. 9. And for this reaſon, one kind of exerciſe is proper to old men, and another to young. "As we ought to fight againſt diſeaſes, ſays he, ſo ought we likewiſe againſt old age. We ought to take care of our health, to uſe moderate exerciſe, and to eat and drink ſo as to refreſh, not oppreſs our bodies."

Sect. CLI.

How far one is obliged to ſeek riches.

But all this is enjoined in vain, if one be ſo diſtreſſed by poverty, that he has it not in his power either to live in a wholeſome manner, nor to regulate

late his labour as his health requires; and therefore it is obvious, that a perſon muſt have a right to ſeek after the things that are neceſſary to ſubſiſtence and decent living. When the proviſion of theſe things is abundant, it is called *wealth* or *riches*; and every one is obliged to acquire as large a ſhare of them as he can by juſt means, and to preſerve and uſe prudently what he hath juſtly acquired *.

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* We do not by ſaying ſo approve of *avarice*, the baſeſt and moſt pernicious of vices. For an avaricious perſon deſires riches for riches ſake; but a perſon who is wiſely ſelfiſh, only deſires them for the ſake of living decently. To the former, no gain, nor no means of increaſing wealth appear baſe and ſordid; nay, ſo much as unjuſt; but this is the conſtant language of his heart,

O cives, cives, quærenda pecunia primum:
Virtus poſt nummos.

The other does not ſcrape riches, but takes hold of every allowable opportunity of gaining them. In fine, whereas the miſer is inſatiable, and yet does not enjoy his poſſeſſions, the other manages his affairs quite otherwiſe; and this is the genuine language of his ſoul,

Haud paravero,
Quod aut avarus ut Chremes terra premam,
Diſcinctus aut perdam ut nepos.

He manages his eſtate with prudent oeconomy, that he may not be forced to live at the expence of others, or ſhamefully to ſpunge them; that he may not be a burden or a ſhame to his friends; that he may not be continually haraſſed by dunning creditors or ſqueezing uſurers; that he may have wherewithal to relieve the indigent, and aſſiſt his friends, and that his children may have no cauſe to reproach him after his death for their diſtreſs. And who will deny that theſe duties are incumbent upon every good man?

Sect. CLII.

And therefore to induſtry.

But becauſe the end cannot be acquired without the means, and there is no other mean of acquiring what is neceſſary to ſupply our neceſſities but labour and induſtry, it is manifeſt that every one is bound to go through with the labours of the buſineſs in life he hath choſen with a cheerful mind, and to give all diligence to get a comfortable ſubſiſtence; and therefore he acts contrary to duty who lives in idleneſs, and thus brings poverty and miſery upon himſelf; for ſuch diſtreſs is ignominious; whereas poverty is not criminal or ſhameful, when one, who does all in his power, is overwhelmed by ſome private or public calamity; or when one, without his own fault, can find no occaſion of doing for himſelf.

* Both therefore belong to the duty of a good man, not to let any occaſion ſlip of bettering his fortune without profiting by it, and to bear honeſt poverty with an equal mind. Job did both. And Horace joins both theſe duties together, who thus complains, in his elegant way, of the inſtability of fortune:

Laudo manentem. Si celeres quatit
Pennas: reſigno, quæ dedit, & mea
Virtute me involvo, probamque
Pauperiem ſine dote quæro.
Carm. l. 3. 29. v. 53.

Sect. CLIII.

And likewiſe to preſerve and increaſe our good name.

Since a perſon ought not to neglect any of thoſe things which are neceſſary to increaſe or preſerve his happineſs (§ 140); and none can doubt but a *good name*, which conſiſts in the favourable opinion of others with regard to our virtue and accompliſhments, is neceſſary to preſerve and increaſe our happineſs. [For one, of whoſe virtue and accompliſhments all think well, all think worthy of happineſs, and all are therefore ſollicitous to promote his happineſs.] For theſe reaſons, every one is obliged to take care of his *reputation*, as a mean of his happineſs; and therefore to act in every affair, private or public, as reaſon directs, and not only to preſerve his good name by worthy actions, but, as much as lies in his power, to increaſe it.

Quaedi [illegible]

* But if this be the intereſt and duty, even of thoſe who have never diminiſhed or ſullied their reputation by any baſe action, how much more are thoſe, whoſe youth is not free from blemiſhes, obliged to endeavour to wipe them off, and procure a good reputation by virtuous deeds? Themiſtocles is an example to us of this, of whom Cornelius Nepos, c. 1. ſays, " This reproach did not break but erect his ſpirit. For perceiving it could not be overcome but by the greateſt virtue, he devoted himſelf wholly and zealouſly to the ſervice of the public and of his friends, by which means he ſoon became illuſtrious." Sueton obſerves of Titus, " That he was recovered from the vices into which his mind had ſtrayed in his youth, by ſhame and the fear of ignominy," Tit. c. 7. Other Examples are to be found in Valerius Maximus, c. 9. and Macrobius, Saturn. 2. 9.

Sect. CLIV.

And to refute aſperſions.

But if it be one's duty to take care to preſerve his good name unblemiſhed (§ 153); ſince *calumnies*, i. e. *falſe reports*, may blacken it; the conſequence is, that we ought to omit nothing that is neceſſary to wipe off aſperſions caſt injuriouſly upon us, unleſs they be ſo groundleſs and malicious, or the author of them ſo contemptible, that it is better to overlook them with generous contempt*.

* Thoſe are called *manifeſt calumnies*, which it is not worth while to give one's ſelf the trouble of confuting. Theſe no more diſturb a good man than the barking of little dogs. And he who ſhamefully ſpits out ſuch againſt one, does not hurt another's reputation, but wholly deſtroys his own. So Simplicius upon Epictetus, c. 64. teaches us: " As, if it be day, the ſun is above the earth, and he who denies it does hurt only to himſelf, and not to the truth. So he who injures you, or throws falſe calumnies upon you, wrongs himſelf, he does not hurt you, or do you any miſchief." The caſe is different if the calumny be *ſpecious*, *i. e.* attended with ſome probability, which may not only deceive the unwary, but even the moſt prudent and cautious. For he who does not take proper methods to refute ſuch reproaches and clear himſelf, muſt appear diffident of his cauſe, and therefore he falls ſhort

of the care he is obliged to, with reſpect to maintaining his good character and name entire and unblamed. For that ought to be as dear to one as life.

Sect. CLV.

Whether in caſe of neceſſity our duties to ourſelves ought to be preferred before thoſe to God.

Tho' ſo far the love of ourſelves be moſt juſt and lawful; yet, no doubt, it becomes vitious, ſo ſoon as it exceeds its due bounds, and gets the aſcendant over our love to GOD, the moſt perfect of Beings (§ 92); and hence we concluded above, (§ 140), that all our duties to ourſelves keep their due rank and place, if they are performed in proper ſubordination to the love of God, or do not encroach upon it; whence it is manifeſt, that the common maxim, "*That neceſſity has no law*," is not univerſally true.

* This aphoriſm is in every one's mouth, and produced on every occaſion as an oracle, as if there were nothing ſo baſe and criminal but neceſſity would render it excuſable. Euripides, in a fragment of Hippolyt. obtect. ſays,

Quoties periclum eſt, ex mea ſententia
Neceſſitati debet & lex cedere.

"In my opinion, in caſes of imminent danger, even law ought to give way to neceſſity." And if this maxim were abſolutely true, the martyrs muſt have ſinned, who paying no regard to the indulgence neceſſity affords, could not be induced to offer the ſmalleſt quantity of incenſe to falſe deities, to eſcape the ſevereſt tortures: nor did Joſeph act leſs fooliſhly, who choſe rather to expoſe his life and liberty to the greateſt danger than ſatisfy the luſt of his miſtreſs: Nor would any wiſe man blame a ſoldier for deſerting his ſtation, when attacked by an enemy whom he was not able to reſiſt. And I might add more examples, but theſe are ſufficient to ſhew, that this maxim about neceſſity cannot be abſolutely true in every caſe.

Sect. CLVI.

Upon what it is founded.

But ſeeing this rule is not always true; and yet in ſome caſes it ought to be admitted (§ 155); different caſes muſt be diſtinguiſhed: now, becauſe in an action impoſed upon us by ſovereign neceſſity, no other circumſtance can vary the caſe, but either *neceſſity* itſelf, the nature of the *law*, or the nature of the *duty* to be omitted, theſe circumſtances ought therefore to be a little more accurately and diſtinctly conſidered, in order to be able to determine how far neceſſity has the power of a law, and when it has not.

Sect. CLVII.

Neceſſity what it is, and of what kinds.

By *neceſſity* we underſtand ſuch a ſituation of a perſon, in which he cannot obey a law without incurring danger. This danger, as often as it extends to life itſelf, is *extreme*; and when it does not, it ought to be meaſured by the greatneſs of the impendent evil. Again, neceſſity is *abſolute*, when it cannot be avoided by any means but by violating a law; and it is *relative*, when another might avoid it, but not the perſon now in the circumſtances *.

* The martyrs were in the caſe of *extreme neceſſity*, being obliged to renounce Chriſt, or to undergo the moſt violent tortures. But it was not extreme neceſſity which forced the Chriſtians to apoſtacy, when *Julian* excluded them from all opportunities of liberal education, from civil honours, and from military ſervice. Daniel was in the caſe of *abſolute neceſſity*, when he was to be expoſed to ſavage beaſts, unleſs he gave over praying to God. The neceſſity with which David ſtruggled when he muſt have periſhed by hunger, or have eat the ſhew-bread, was *relative*. For another who had undertaken a journey without flying precipitantly, would certainly have found other bread to ſatisfy his hunger.

Sect. CLVIII.

Where neceſſity merits favour.

Now every one may eaſily perceive, that not only *extreme neceſſity*, but even neceſſity in which life is not in danger, comes here into the account. For becauſe ſome calamities are bitterer than death, who can doubt but ſuch may ſtrike terror into the moſt intrepid breaſt; ſuch as being deprived of one's eyes, and other ſuch like diſtreſſes. Beſides, ſince of two phyſical evils the leaſt is to be choſen, the conſequence muſt be, that not only abſolute neceſſity deſerves favour, but even relative neceſſity, if one had no hand in bringing himſelf into the ſtrait *.

Sect. CLIX.

Affirmative laws, divine and human, admit the exception of neceſſity.

Law being either *divine* or *human*, and both being either *affirmative* or *negative* (§ 64); becauſe even a ſovereign cannot oblige one to ſuffer death without a fault, the conſequence is, that all *human laws* ought regularly to be underſtood, with the exception of neceſſity. And the ſame is true of *divine affirmative laws*, becauſe the omiſſion of an action cannot be imputed to one, if the occaſion for performing it was wanting (§ 114), unleſs the omiſſion be of ſuch a nature and kind, that it tends directly to reflect diſhonour on God; in which caſe, the negative law, forbidding all ſuch actions likewiſe concurs (§ 131). And to this caſe belongs the action of Daniel, Dan. vi. 10.

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* If one unneceſſarily expoſes himſelf to danger, he is the cauſe of the neceſſity he is brought under, and therefore the event ought to be imputed to him (§ 105). And for this reaſon, the neceſſity into which one threw himſelf, who having torn an edict againſt the Chriſtians into pieces, was moſt terribly tortured, ſcarcely merited favour. Lactant. de mort. perſequut. cap. 13. But if one ſhould commit any thing contrary to probity and juſtice, even to eſcape death and tortures, who will deny that he does ill? Quintus, mentioned by the church of Smyrna, in a letter concerning the martyrdom of Polycarpus, is an example of this, who having voluntarily offered himſelf to martyrdom, and perſuaded others to do the ſame, ſo ſoon as he ſaw the beaſts, ſwore by the genius of Cæſar, and defiled himſelf by offering an idolatrous ſacrifice: upon which occaſion the Smyrneans thus expreſs themſelves, "We do not approve, ſay they, our brethren who unneceſſarily or imprudently expoſe and betray themſelves, ſince it is otherwiſe commanded in the goſpel." And we find the like admonitions in Origen upon John xi.

* All this is clear. Men when they ſubmit themſelves to civil government, transfer to the magiſtrate all power, without which the end of government cannot be obtained. They therefore transfer to him the power of life and death, not promiſcuouſly, becauſe that is contrary to the end of government, but only ſo far as the public ſafety requires it. Therefore the ſupreme magiſtrate cannot oblige his ſubjects to ſuffer death without a reaſon, but then only when the public ſafety or good requires it; and therefore, his laws are regularly to be underſtood, with the exception of neceſſity. Hence Grotius ſays elegantly, de jure belli & pacis, 1. 4. 7. 2. "Laws ought to be, and commonly are made by men with a ſenſe of human weakneſs."

Sect. CLX.

But not divine negative laws relative to our duties to God or ourſelves.

Divine *negative* laws bind us either to duties towards *God*, towards *ourſelves*, or towards *other men* (§90 & 124). Thoſe which reſpect our duties towards God are of ſuch a nature, that they cannot be intermitted without diſhonouring God. But we are ſtrictly bound to avoid whatever tends to diſhonour God; the conſequence of which is, that no neceſſity can excuſe the violation of the negative laws relating to our duties towards God *. On the other hand, in a colliſion of two duties reſpecting ourſelves, the ſafeſt courſe is to chooſe the leaſt of two phyſical evils.

* Hence it is plain, that there is no excuſe for him, who ſuffers himſelf to be tempted by any neceſſity he may be under to blaſpheme God, ſacrifice to idols, or contaminate himſelf by perjury. This the Pagan writers have acknowledged. So Juvenal,

Ambiguæ ſi quando citabere teſtis
Incertæque rei, Phalaris licet imperet, ut ſis
Falſus, & admoto dictet perjuria tauro,
Summum crede nefas, animam præferre pudori
Et propter vitam vivendi perdere cauſſas. Sat. 8.

But tho' thoſe who ſuccumb under ſuch a direful neceſſity are not excuſable, yet the ſenſe of human weakneſs obliges us to pity their lot who were ſhaken by ſuch a cruel neceſſity, ſince we know that Peter found pardon for having denied Chriſt, after he had repented, Matt. xxvi. 75.

Sect. CLXI.

Divine affirmative laws reſpecting our duties to others admit of favour in the caſe of neceſſity.

As to our duties towards other men, affirmative laws, 'tis certain, admit of favour in the caſe of neceſſity; partly becauſe an omiſſion cannot be imputed when the occaſion of performing a duty was wanting (§ 114); partly becauſe the law of benevolence does not oblige us to delight in the happineſs of others more than our own, or to love others better than ourſelves (§ 94); and ſo far the maxim holds juſt, "Every one is neareſt to himſelf."

* Thus, *e. g.* the divine law does not oblige one to ruin himſelf to ſave another, or to give to another the ſmall morſel of bread that remains to himſelf, when he is ſtarving. That, the moſt holy and ſtrict law of love inculcated by the Chriſtian religion does not require, 2 Cor. viii. 13. Wherefore Seneca ſays rightly, de benefic. 2. 15. " I will give to the needy, but ſo that I may not want myſelf: I will relieve him who is ready to periſh, but ſo that I may not periſh myſelf." And this was the meaning of the ſcholaſtic doctors, when they pronounced this rule, " Well ordered charity begins at home."

Sect. CLXII.

What is the caſe with regard to negative laws.

Moreover *negative laws*, relative to our ſocial duties, in the caſe of providential neceſſity, interfere either with the duty of ſelf-preſervation, or with the duty of defending and increaſing our perfection and happineſs. Now in the former ſituation, ſince we are not obliged to love others more than ourſelves, (§ 94), without doubt, in the caſe of neceſſity, every way of preſerving ourſelves is allowable, when a man hath not fallen under that neceſſity by his own neglect or default; or if the condition of the perſons be equal; for equality leaves no room to favour or privilege. In the latter caſe, it is better for us to want ſome perfection, or ſome particular kind or degree of happineſs, than that another ſhould periſh that we may have it *.

* For to want any perfection is a phyſical evil, if it be not our fault that we have it not. But to make another periſh is a moral evil, which is always to be reckoned greater than any phyſical one. But ſince the leaſt of two phyſical evils ought to be choſen, and therefore a phyſical evil is to be undergone rather than any moral one is to be acted, he certainly doth no evil, who in ſuch a caſe chooſes to ſave another perſon with ſome detriment to himſelf; wherefore, tho' he is not to be blamed who in a ſhipwreck catching hold of a plank which will not hold two, hinders another from getting upon it, yet he is altogether inexcuſable, who by the hopes of greater happineſs to himſelf, is induced to betray his friend againſt all honour and conſcience.

Sect. CLXIII.

What if the neceſſity proceeds from human malice?

All this holds true, if the neceſſity we are under be merely providential (§ 142); but if it proceeds from the malice of men, they do it either that we may periſh, or that they may lay us under the neceſſity of acting wrong. And in the former caſe, ſince we are not bound to love any other better than ourſelves, much leſs a bad perſon (§ 94); he is juſtly excuſable who ſuffers another to periſh rather than himſelf. In the latter caſe, the crueleſt things ought to be ſubmitted to, rather than do any thing diſhonourable to God (§ 131.) *

* Thus, for example, if we ſhould fall into the ambuſcades or hands of robbers, every way of extricating ourſelves out of this danger is allowable, becauſe no reaſon binds us to prefer the ſafety of a robber to our own. But Joſeph would have acted ill, if he had feared a priſon, and chains more than adultery, to which Potiphar's wife endeavoured to ſeduce him.

Sect. CLXIV.

An admonition with regard to the application of theſe rules to particular caſes.

Having mentioned theſe rules, moſt of which have been fully explained by others *, it will not be difficult to determine the caſes propoſed by Puſendorff and others. Indeed, if we attend narrowly to the matter, we will find that many propoſed on this ſubject are ſuch as very rarely happen, and many others are of ſuch a nature, that all is tranſacted in an inſtant, ſo that there is hardly time or room for calling in reaſon to give its judgment of the juſtice, or injuſtice of an action; to which caſes, we may not improperly apply what Terence ſays,

Facile omnes, quum valemus, recta conſilia ægrotis damus,
Tu, ſi hic eſſes, aliter ſentires. Andr. 1. 1. v. 9.

For which reaſon, it is better to leave many of theſe caſes to the mercy of God, than to enter into too ſevere a diſcuſſion of them.

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* Moſt of the preceding rules have been already treated of by Thomaſius, Juriſp. divin. 2. 2. 143. & ſeq. but not upon the ſame principles we have here laid down. But the ſame author afterwards is for ſequeſtrating them from the law of nature, and for recalling this one rule, "That all laws include a tacite exception of neceſſity:" but we can ſee no ground for omitting or ſequeſtrating exceptions, which, what hath been ſaid, fully proves to be founded upon, and to flow from right reaſon itſelf.

Sect. CLXV.

Whether it be lawful to cut off a member.

Thus none can doubt but neceſſity will excuſe a perſon who muſt let a member be cut off to prevent his periſhing; or that the other parts may not be endangered by it. For tho' we owe both theſe duties to ourſelves, *viz.* to preſerve our life, and to preſerve every member intire, yet the leaſt of two phyſical evils is to be choſen (§ 160); and it is certainly a leſſer evil to be deprived of a member than to loſe life. It is therefore a lawful mean of ſaving life to do it by the loſs of a member *.

* But it is a more difficult queſtion, whether it be a preceptive law of nature, and whether he does contrary to his duty, who being in the direful neceſſity above mentioned, chooſes rather to die than to bear pain, to which he feels himſelf unequal; eſpecially when it is not certain what may be the event of the amputation, ſeeing not fewer who have undergone the torment with great conſtancy have periſhed than have been ſaved. Old age, bodily infirmity, the dangerous nature of the diſeaſe, the difference in opinion among the phyſicians, the unskilfulneſs or want of experience in the ſurgeon, all theſe conſiderations may eaſily determine one to think the cure more uneligible than death itſelf, and to judge it better to die without ſuffering ſuch exquiſite pain, than run the risk of undergoing it without ſucceſs. Wherefore, I would have us to remember the admonition given above, and to leave ſuch caſes to the divine judgment and mercy, rather than to pronounce hardily and raſhly about them.

Sect. CLXVI.

Whether it be lawful to eat human fleſh in extreme neceſſity?

There is no doubt but that they are excuſable, who in extreme hunger and want have recourſe to any food, even to the fleſh of dead men: for ſince here there is a conteſt between two duties towards ourſelves; of two phyſical evils, death and deteſtable food, the leaſt ought to be choſen (§ 160). But he is by no means excuſable who kills another, that he may prolong a little his own miſerable life by eating his fleſh; for however direful and imperious the neceſſity of long hunger may be, it does not give us a right to another's life that we ourſelves may be ſaved, becauſe here the condition and neceſſity * of both perſons are equal (§ 162).

* But what if all the perſons being under the ſame fatal neceſſity ſhould by conſent commit it to lot to determine which of them ſhould be ſacrificed to the preſervation of the reſt, (as in the caſe of the ſeven Britons, quoted by Ziegler upon Grotius de jure belli & pacis, 2. 1. 3. from

the obſervations of Tulpius, Obſer. medic. 1. 43.) Here I affirm the ſame thing. For none hath a right to take away another's life. And he who conſents to his own murder is as guilty as he who kills himſelf or another. Ziegler juſtly aſſerts, ibidem p. 189. "That none ought ſo far to deſpiſe his own life, as to throw it away to ſatisfy another's hunger, nor ought others to attack their neighbour's life to quell their own cravings." To which Pufendorff hath not given an anſwer altogether ſatisfactory, de jure nat. & gent. 2. 6. 3.

Sect. CLXVII.

Whether in ſhipwreck?

The caſe is not the ſame, when one in ſhipwreck, having got upon a plank only ſufficient to ſave himſelf, keeps others from it with all his force; or with thoſe who leaping firſt into a boat, will not allow others, whom it cannot contain with ſafety, to come into it, but precipitate them into the ſea; becauſe in theſe caſes, he who firſt ſeized the plank, or they who firſt got into the boat, are in poſſeſſion, and therefore others have no right to deprive them of it, tho' they be in the ſame danger. And who will not own, that it is a leſs evil that a few, than that all ſhould periſh, or a greater good that a few, than that none ſhould be ſaved * ?

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* Upon the ſame principle may the caſe be decided of ſoldiers flying into a fortified camp or city, who ſhut the gates againſt thoſe who arrive a little later, leſt the enemy ſhould get in at the ſame time with them. Such was the deed of Pandarus, deſcribed by Virgil, Æn. 9. v. 722. & ſeq. and of others, of which caſes, ſee Freinſh. ad Curt. 4. 16. 8. But in all theſe, we are carefully to conſider whether the neceſſity be extreme and abſolute (158), or the danger be more remote, and ſuch as might otherwiſe be avoided. Hence the humanity of Darius, flying from Alexander, is very commendable, who, when he was preſſed to cut the bridge over the Lycus, anſwered, "That he would much rather leave a paſſage to the purſuers, than cut it off from the flyers, Curt. 4. 16.

Sect. CLXVIII.

Whether neceſſity excuſes an executioner commanded to put an innocent perſon to death.

I can by no means think an executioner, or any other, excuſable, who being commanded to put an innocent perſon to death, thinks he ought to obey, and that his own danger is ſufficient to exculpate him. For this neceſſity proceeds from the wickedneſs of men; and in ſuch a caſe every one ought to bear every thing, rather than do any thing tending to diſhonour God (§ 163) *.

* Beſides, nothing ought to be done in oppoſition to the certainty of conſcience (§ 45): but here the executioner is ſuppoſed to know certainly the perſon whom he is commanded to put to death to be innocent: who then can abſolve him from guilt? Nor does Pufendorff's diſtinction alter the caſe: "For tho' he ſays, that when an executioner merely executes the command of another, the action can no more be imputed to him than to the hatchet or ſword," jur. nat. & gent. 1. 5. 9. 8. 1. 5. 6. yet certainly there is a wide difference between a ſword or a hatchet, mere inanimate things, and a man endued with reaſon, whoſe conſcience tells him the ſentence he is to execute is unjuſt.

Sect. CLXIX.

Whether it be lawful to throw down one who is in our way when we fly.

But an innocent perſon, to ſave his life, may, in flying from his enemy, puſh out of his way, or throw down any perſon who ſtops or hinders his flight, even tho' he may have reaſon to ſuſpect the perſon may thereby be hurted. For if one ſtops the perſon who flies with a bad intention, this neceſſity proceeds from human malice, and ſuch a perſon really does what he can to make the perſon flying periſh. And if one be in his way, without any intention to hurt him, this neceſſity is providential in reſpect of the flyer. But in both caſes, every way of ſaving one's ſelf is allowable (§163) *.

We need not ſtay to refute the contrary opinion of Albertus. Comp. jur. nat. orthod. conform. cap. 3. § 17. For his argument taken from the unlawfulneſs of killing an innocent perſon in the ſtate of integrity, is nothing to the purpoſe; becauſe neither is the principle of natural law to be deduced from that ſtate (§ 74); nor in that ſtate can any danger be conceived that muſt be avoided by ſuch an unhappy flight.

Sect. CLXX.

Whether in caſe of neceſſity we may lawfully ſeize upon another's goods?

The ſame muſt be ſaid of thoſe caſes in which one is neceſſitated by hunger or cold to lay hold of the goods belonging to others *; or when, in the danger of ſhipwreck, the goods of others muſt be thrown over board. For, in the firſt caſe, the neceſſity ariſes from the malice of men in ſuffering any to be in imminent danger from hunger or cold, (§ 163); and, in the laſt caſe, of two phyſical evils the leaſt is choſen, when, in the danger of ſhipwreck, men perceiving that they muſt either periſh themſelves together with the goods, or make reparation to others for their goods which are caſt in this neceſſity into the ſea (§ 160) *, throw them over board.

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* Thoſe who differ from us in this matter call theſe actions *theft*, which they pronounce ſo great a crime that it can never be committed without guilt, even in circumſtances of the moſt urgent neceſſity. But if killing a man, even according to the principles thoſe very authors go upon, cannot be imputed to one as a crime, in the caſe of unblameable ſelf-defence, why ſhould theft be reckoned criminal by them, in the caſe of ſelf-preſervation? Beſides, who imagines theft to be a crime when done without any malicious intention, nay without ſo much as any deſign to make profit by it? Finally, ſince perſons in the meaneſt circumſtances may eaſily, after they have extricated themſelves out of their pinching ſtraits, make reparation for the very ſmall matter neceſſity can force them to take from another, who can make a crime of chooſing to take a little from its lawful owner, that may be eſtimated and repaid, with a ſerious deſign to make reparation, ſo ſoon as it poſſibly can be done, rather than to periſh? Add chap. 3. 10. of *theft.*

Sect. CLXXI.

The conclusion of this chapter.

But numberleſs ſuch caſes may happen, or at leaſt may be put, ſome of which are truly perplexed and dubious; and therefore let us not forget the admonition already mentioned (§ 164). We ſhall add no more upon the ſubject, leaving other queſtions to thoſe who aſſume to themſelves the province of commanding or guiding mens conſciences.

Remarks on this chapter.

The principles our author hath laid down in this chapter, are moſt exact, and proper to decide all queſtions which can be propoſed concerning the right, the privilege, the favour, the leave, or whatever we call it, that ariſes from neceſſity. It is however well worth while to look into what the learned Barbeyrac hath ſaid upon this difficult ſubject in his notes upon Pufendorff's ſixth chapter, book ſecond, of the law of nature and nations. Pufendorff, in the beginning of that chapter, quotes an excellent paſſage of Cicero with regard to neceſſity, in which the general rule is very clearly ſtated. It is towards the end of his ſecond book of *invention*; too long indeed to be inſerted here, but deſerving of attentive conſideration. The chief deſign of our Author's *ſcholia* being to refer his readers to paſſages in ancient authors, where moral duties are rightly explained and urged by proper arguments, in order to ſhew that the duties of the law of nature are diſcoverable by reaſon, and were actually known in all ages to thinking perſons, at leaſt, he might very properly have on this occaſion referred us to that place in Cicero. For this is no doubt the moſt perplexed ſubject in morals, *The right and priviledge of neceſſity*. And upon it we find Cicero reaſoning with great accuracy and ſolidity: inſomuch, that if we compare with this paſſage the 25th chapter of his ſecond book of offices, where he treats of comparing things profitable one with another; and the 3, 4, 5, and following chapters in the third book, where he conſiders competition between *honeſty* and *intereſt*, or *profit*, we will find full ſatisfaction upon this head. In the 4th chapter of the 3d book he hath this remarkable paſſage.— "What is it that requires conſideration on this ſubject? I ſuppoſe it is this, that it ſometimes happens men are not ſo very certain, *whether the action deliberated upon be honeſt or not honeſt*." For that which is uſually counted a piece of villainy is frequently changed by the times or circumſtances, and is found to be the contrary. To lay down one inſtance, which may ſerve to give ſome light to a great many others: pray what greater wickedneſs can there be upon earth (if we ſpeak in general) than for any one to murder not only a man, but a familiar friend? And ſhall we therefore affirm that he is chargeable with a crime who has murdered a tyrant, tho' he were his familiar? The people of Rome, I am ſure, will not ſay ſo, by whom this is counted among the greateſt and moſt glorious actions in the world. You will ſay then, *Does not intereſt carry it againſt honeſty?* No, but rather honeſty voluntarily follows intereſt. If therefore, we would upon all emergencies be ſure to determine ourſelves aright, when that which we call our advantage or intereſt ſeems to be repugnant to that which is honeſt, we muſt lay down ſome general rule or meaſure, which, if we will make uſe of in judging about things, we ſhall never be miſtaken as to point of duty. Now this meaſure I would have to be conformable to the doctrine and principles of the Stoics, which I principally follow throughout this work. For tho' I confeſs, that the ancient Academics and your Peripatetics, which were formerly the ſame, make honeſty far preferable to that which ſeems one's intereſt: yet thoſe who aſſert, that whatever is honeſt muſt be alſo profitable, and nothing is profitable but what is honeſt, talk much more bravely and heroically upon this ſubject than thoſe who allow, that there are ſome things honeſt which are not profitable, and ſomethings profitable which are not honeſt." The principle of the Stoics he explains more fully a little after, where he aſſerts with them, "Certainly greatneſs and elevation of ſoul, as alſo the virtues of juſtice and liberality, are much more agreeable to nature and right reaſon than pleaſure, than riches, than even life itſelf: to deſpiſe all which, and regard them as juſt nothing, when they come to be compared with the public intereſt, is the duty of a brave and exalted ſpirit: whereas to rob another for one's own advantage, is more contrary to nature than death, than pain, or any other evil whatever of that kind." This queſtion concerning the interferings which may happen between duty and private intereſt, or ſelf-preſervation, will clear up, as we go on with our Author in the enquiry into our duties to others, and into the rights and bounds of ſelf-defence; I ſhall only add to what our author aſſerts, in oppoſition to Pufendorff, about executioners, that if we conſult the apology of Socrates by Plato, and that by Xenophon, we will find ſeveral fine paſſages, which ſhew that we ought never to obey our ſuperiors to the prejudice of our duty; but very far from it; and unleſs we are in an entire incapacity to reſiſt them, we ought to exert ourſelves to the utmoſt of our power, and endeavour to hinder thoſe who would oppreſs the innocent from doing them any miſchief See Grotius, l. 2. c. 26. § 4. 9. as alſo Sidney's diſcourſe upon government, ch. 3. § 20, and Mr. Barbeyrac's notes on Pufendorff, of the law of nature and nations, b. 8. c. 1. § 6. I beg leave to ſubjoin, that I know nothing that can better ſerve to prepare one for wading through all the ſubtleties, with which morality in general, and this particular queſtion about the contrariety or competition that may happen between ſelf-love and benevolence in certain caſes, are perplexed, than a careful attention to two diſcourſes upon the love of our neighbour, by Dr. Butler (Biſhop of Briſtol) in his excellent ſermons, to copy which would take up too much room in theſe notes, and to abridge them without injuring them is hardly poſſible, with ſuch conciſeneſs and equal perſpicuity are they wrote. Theſe ſermons make the beſt introduction to the doctrine of morals I have ſeen; and the principles laid down in them being well underſtood, no queſtion in morals will afterwards be found very difficult. It is owing to not defining terms, or not uſing terms in a determinate fixed ſenſe, (the terms *ſelf-love*, *private intereſt*, *intereſted* and *diſintereſted*, and other ſuch like, more particularly) that there hath been ſo much jangling about the foundations of morality. They who ſay, that no creature can poſſibly act but merely from ſelf-love; and that every affection and action is to be reſolved up into this one principle, ſay true in a certain ſenſe of the term *ſelf-love*. But in another ſenſe, (in the proper and ſtrict ſenſe of *ſelf-love*,) how much ſoever is to be allowed to it, it cannot be allowed to be the whole of our inward conſtitution; but there are many other parts and principles which come into it. Now, if we ought to reaſon with regard to a moral conſtitution, as we do with reſpect to a bodily frame, we muſt not reaſon concerning it from the conſideration of one part ſingly or ſeparately from the reſt with which it is united; but from all the parts taken together, as they are united, and by that union conſtitute a particular frame or conſtitution. The final cauſe of a conſtitution can only be inferred from ſuch a complex view of it. And the final cauſe of a conſtitution is but another way of expreſſing what may properly be called the end for which it was ſo framed, or the intention of its Author in ſo conſtituting it. The end of our frame therefore, and by conſequence the will of our Maker with regard to our conduct, can only be inferred from the nature of our frame, or the end to which it is adapted: But if we are to infer our end from our frame, no part of this frame ought to be left out in the conſideration. Wherefore, tho' ſelf-love ought to be taken into the account, yet ſeveral particular affections muſt alſo be taken into the account; benevolence muſt likewiſe be taken into the account, if it really belongs to our nature; a ſenſe of right and wrong, and reaſon muſt alſo be taken into the account; and whatever is taken into the account muſt be taken into it as it really is, *i. e.* affections muſt be conſidered as ſubjects of government, and reaſon muſt be conſidered as a governing principle, for ſuch they are in their natures. But of this more afterwards, in the remark upon the duties reducible to benevolence.

CHAP. VII.

Concerning our abſolute and perfect duties towards (others in general,) and of not hurting or injuring others (in particular.)

Sect. CLXXII.

The foundation of our duties towards others,

LEt us now proceed to conſider *our duties towards others*, the foundation of which lies, as was obſerved above, in this, that man is by nature *equal* to man, and therefore every man is obliged to love every other with a love of friendſhip (§ 85 & 88). And becauſe equality of nature requires equality of offices, hence we concluded, *that every man is obliged to love every man no leſs than himſelf* (§ 93).

Sect. CLXXIII.

They are either perfect or imperfect.

We have alſo ſhewn that there are two degrees of this love, one of which we called *love of juſtice*, and the other *love of humanity and beneficence* (§ 82 & ſeq.) But becauſe the former conſiſts in doing nothing that may render one more unhappy, and therefore in not hurting any perſon, and in giving to every one his own, or what is due to him; and the latter conſiſts in endeavouring, to the utmoſt of our ability, to increaſe and promote another's perfection and happineſs, and in rendering to him even what we do not owe to him by ſtrict and perfect obligation; the conſequence of this is, that of the duties we owe to others, ſome are duties of juſtice, which are of *perfect* obligation, and others are duties of humanity and beneficence, which are of *imperfect* obligation.

Sect. CLXXIV.

These duties defined. Therefore thoſe are *perfect duties*, to which one is bound by ſuch perfect obligation, that he may be forced to perform them; ſuch as to injure no perſon, and to render to every one what is due to him: thoſe are *imperfect*, to which we cannot be forced, but are only bound by the intrinſic goodneſs of the actions themſelves; ſuch as, to ſtudy to promote the perfection and happineſs of others to the utmoſt of our power (§ 84)*.

* *Perfect duties* therefore lay us under a neceſſity of not rendering any one more imperfect or more unhappy: *imperfect duties* ſhew us, that we then only arrive to the glory of being truly good and virtuous, when we delight in promoting the perfection and happineſs of others, as much as in us lies. Theſe duties were accurately diſtinguiſhed by ancient lawyers, when with Paullus they ſaid, ſome were rather of good will and virtue than of neceſſity (voluntatis & officii magis quam neceſſitatis) l. 17. § 3. D. commodati. Add to this a paſſage of Seneca quoted above in the ſcholium upon § 84.

Sect. CLXXV.

They are divided into abſolute and hypothetical. Since *perfect duties* may be reduced to *not injuring any one, and rendering to every one his due* (§ 174); but to injure, is to render one more unhappy than he is by nature, or would otherwiſe be (§ 82); and one may call that his *due*, or *his own*, which he hath juſtly acquired (§ 82); it follows, that obligation not to injure any one is *natural*; and obligation to render to every one his due is *acquired*; whence the former is called *abſolute*, and the latter we call *hypothetical* *.

* *Abſolute duty* is what one man has a right to exact from another, without any right acquired to himſelf by any previous deed: hypothetical duty is what one can exact from another, in conſequence of a right acquired by ſome deed. Thus a man has a right, to exact from every other that he ſhould not take away his life, which is not

acquired by any particular deed: But no perſon hath a right to complain, that things are taken from him by another unjuſtly, unleſs he hath acquired a right or property in them by ſome deed: therefore, not to kill any one is a duty of an abſolute nature: but not to ſteal, is a duty of a hypothetical kind. If Salmaſius had attended to this diſtinction (Salmaſius de uſur. cap. 9.) he would eaſily have underſtood why the lawyers ſaid that theft is forbidden by natural law (furtum admittere jure naturali prohibitum eſſe) l. 1. § 3. D. de furt. § 1. Inſt. de oblig. quæ ex delict.

Sect. CLXXVI.

In what order theſe duties ought to be treated.

Further, ſince the right we acquire to any thing ariſes either from *dominion*, or from *compact* or *convention*, it follows that all *hypothetical* duties ſpring either from *compact* or from *dominion*; and therefore this will be the propereſt order we can follow, to begin firſt with conſidering *perfect abſolute* duties, and then to treat of *imperfect* ones; next to ſpeak of thoſe *hypothetical* duties, which ariſe from *dominion* or *property*; and laſtly, to handle thoſe which ariſe from *compact*. But *imperfect* ones ought to be conſidered before we come to the *hypothetical* ones, becauſe after *dominion* and *compacts* were introduced into the world, humanity becoming very cold and languid, men have ſadly degenerated into ſelfiſhneſs.

Sect. CLXXVII.

Every man ought to treat every other as his equal.

Firſt of all, it ought to be laid down as a maxim, that men are by nature equal (§ 172), being compoſed of the ſame eſſential parts; and becauſe tho' one man may ſhare perfections, as it were by his good lot, above others, yet different degrees of perfection do not alter the eſſence of man, but all men are equally men: whence it follows, that every one ought to treat every other as equally a man with himſelf, and not to arrogate to himſelf any privilege in things belonging to many by perfect right, without a juſt cauſe; and therefore not to do to any other what he would not have done to himſelf (§ 88).

* This rule is ſo agreeable and ſo manifeſt to right reaſon, that it was known to the Pagans. Lampridius tells us, that Alexander Severus delighted in this maxim. cap. 1. "He had this ſentence, ſays he, frequently in his mouth, which he had learned from Jews or Chriſtians: "Do not to others what you would not have done to yourſelf." And he ordered it to be proclaimed aloud by a public crier, when he was to correct or animadvert upon any perſon. He was ſo charmed with it, that he ordered it to be inſcribed every where in his palace, and on all public works." It is not improbable, as Lampridius obſerves, that Alexander had learned this maxim from Chriſtians: For we find it in the affirmative ſenſe, Mat. vii. 12. and Luke vi. 31. But it does not follow from hence, that reaſon could not have diſcovered this truth. We find ſimilar precepts and maxims in Simplicius upon Epictetus Enchirid. cap. 37.

Sect. CLXXVIII.

And then no perſon ought to be injured.

Since therefore we ought not to do to any one what we would not have done to ourſelves (§ 177); but none of us would like to be deprived by any other of our perfection and happineſs which we have by nature, or have juſtly acquired; *i. e.* to be injured or hurt (§ 82); the conſequence is, that we ought not to render any one more imperfect or unhappy, *i. e.* injure any one. And becauſe to what conſtitutes our felicity and perfection, belongs not only our *body*, but more eſpecially our *mind*, this precept muſt extend to both theſe parts, and an injury to our mind muſt be as much greater than an injury to our bodily part, as the mind is more excellent than the body *.

* Hence Epictetus ſeverely reproaches thoſe who look upon that only as an injury by which their body or their outward poſſeſſions are impaired, and not that by which their mind is rendered worſe. "When we have received any damage in what belongs to our bodies or eſtates, we

immediately think we have ſuffered a great loſs. But when any detriment happens to us with reſpect to our will or temper, we think we have ſuffered no damage, for as much as he who corrupts or is corrupted by another, hath neither an aking head, ſtomach, eye or ſide, nor hath not loſt his eſtate; and we look no farther than to theſe outward things. But with us it admits no diſpute, whether it be better to have a pure and honeſt will, or an impure and diſhoneſt one, &c." Arrian. Diſſ. Epict. 2. 10.

Sect. CLXXIX.

No perſon may be killed, no injury may be done to one's body, health, &c.

The perfection and happineſs of man conſiſts in *life*, *i. e.* in the union of his ſoul and body (§ 143), which is of all he hath received from nature the moſt excellent gift, and is indeed the baſis or foundation of all the reſt: ſince therefore it is unlawful to deprive any one of the perfection and happineſs he hath received from nature, and we would not chooſe to have our life taken away by another, (§ 178), it is ſelf-evident, that it is our duty not to kill any perſon; not to do the leaſt detriment to his health; not to give any occaſion to his ſickneſs, pain, or death, or not to expoſe him to any danger, without having a right to do it, or with an intention to have him killed.

* For he who expoſes a perſon, over whom he hath no authority, to danger, is no leſs guilty than he who, abuſing his right and power to command, expoſes one whoſe death he deſires, to danger, purpoſely that he may get rid of him. There are examples of this in Polybius, 1. 9. Diod. Sic. Bibl. 14. 73. 19. 48. Juſtin. Hiſt. 12. 5. Curt. 7. 2. and likewiſe in the ſacred writings, 2 Sam. xi. 15. and xii. 9. where Nathan accuſes David of murder for having placed Uriah in a moſt dangerous ſituation, with intention that he might periſh. See Pufend. de jure nat. & gent. 8. 2. 4.

Sect. CLXXX.

Unleſs neceſſity obliges to lawful ſelf-defence.

Yet ſince none is obliged to love another more than himſelf (§ 94), and it may often happen

pen that either one's ſelf or another muſt periſh; the conſequence is, that in caſe any one attack us, in this doubtful ſtate of danger, every way of ſaving one's ſelf is lawful (§ 163); and therefore we may even kill an aggreſſor, provided we do not exceed the limits of juſt ſelf-defence.

Sect. CLXXXI.

Its limits.

But what are the limits of juſt ſelf-defence none will be at a loſs to underſtand, who calls to mind, that abſolute or inevitable neceſſity merits favour, (§ 158): For hence it follows, That blameleſs ſelf-defence takes place, if one be in abſolute neceſſity, or even in relative neceſſity, provided he be ſo, not by his own fault (§ 158): That all danger being paſt, there is no further any right of defence: That when danger can be avoided without hurting the aggreſſor, or by a leſſer evil, there is no right to kill him *; becauſe of two evils the leaſt ought always to be choſen.

* Man is always bound to chooſe that which is beſt, (§ 92); but that is beſt which is the ſafeſt and eaſieſt mean for obtaining our end. We are therefore obliged to take the ſafeſt and leaſt hurtful mean of ſaving ourſelves, and therefore to avoid killing a perſon, if there be any other way of delivering ourſelves from danger. Theocritus ſays rightly, "It is fit to remove a great contention by a ſmall evil."

Sect. CLXXXII.

Againſt whom we may uſe it.

Theſe evident principles being attended to, nothing can be more eaſy than to anſwer all the queſtions which are commonly propoſed with relation to due moderation in ſelf-defence. For if it be aſked againſt whom it is allowable, you will anſwer rightly, if you ſay, againſt all by whom we are brought into danger without any fault of our own (§ 81); and therefore even againſt mad perſons, perſons diſordered in their ſenſes, and even againſt thoſe who attack you by miſtake, when they are intending to aſſault another. For as Grotius of the rights of war and peace, 2. 1. 3. has well obſerved, the right of ſelf-defence in ſuch caſes does not proceed from his injuſtice or fault; by whom the danger is occaſioned, but from our own right of repelling all danger by any means, and of not preferring in ſuch circumſtances the life or ſafety of another to our own *.

Sect. CLXXXIII.

The extent of it in a ſtate of natural liberty.

Nor will it be leſs eaſy to determine how long this right of defence againſt an aggreſſor continues. For here doctors juſtly diſtinguiſh between thoſe living in a ſtate of nature, and ſubject to no magiſtrate, by whom they may be defended and protected; and thoſe who live in a civil ſtate, and under magiſtracy. For ſince, in a ſtate of natural liberty, there is none to protect us againſt injuries, our right of ſelf-defence cannot but begin the moment our danger commences, and cannot but continue while it laſts, or till we are abſolutely ſecure, (§ 181). But our danger begins the moment one ſhews a hoſtile diſpoſition againſt us, and while that continues, our right of ſelf-defence laſts.

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* And to this belongs the fable of Oedipus, who having unknowingly killed his father, who attacked him, in his own defence, thus excuſes himſelf in Sophocles, in Oedip. v. 1032. " Anſwer me one thing. If any one ſhould attack you, even a juſt perſon, to kill you, would you ask whether it was your father, or would you not immediately defend yourſelf? I think, if you loved your life, you would defend yourſelf againſt the aggreſſor, and not ſtay to conſider what was juſt. I fell into ſuch a misfortune by fate, as my father, could he revive, would himſelf acknowledge."

* And this is the foundation of the whole rights of war, *viz.* that we may carry on acts of hoſtility againſt any perſon who hath clearly ſhown his hoſtile diſpoſition againſt us; and refuſes obſtinately all equal terms of peace,

till having laid aſide his enmity, he is become our friend: of which afterwards in its own place.

Sect. CLXXXIV.

And in a civil ſtate.

On the other hand, in a civil ſtate, one who ſhews enmity againſt another, trapps, or lays ſnares for him, may be coerced by the civil magiſtrate; the conſequence of which is, that a member of a civil ſtate, hath not a right, by his own force and arms, to reſiſt another member who attacks him, or lays ſnares for him; nor, when the danger is over, to take that revenge at his own hand which he might expect from the magiſtrate. And therefore, the ſpace or time of juſt ſelf-defence is confined within much narrower limits in that ſtate; it begins with the danger, and laſts no longer than the danger itſelf laſts *.

* And therefore the lawyers rightly permit violent ſelf-defence, only in the moment of aſſault. Ulpian, l. 3. § 9. D. de vi & armis. "We may repel him by force who aſſaults us with arms, but in the moment, and not ſome time after." And Paullus more expreſly in another place, where he ſays, "That one who throws a ſtone againſt one ruſhing upon him, when he could not otherwiſe defend himſelf, was not guilty by the Lex Aqu. l. 45. § 4. D. ad leg. Aquil.

Sect. CLXXXV.

The meaſure of violent ſelf-defence.

Moreover, from theſe principles (§ 181), you may eaſily ſee that ſelf-defence to the point of killing the aggreſſor is not lawful; if one was forewarned of the aſſault, or foreſeeing it in time, could have kept at home, or retired into a ſafer place, or could, by wounding or maiming the injurious perſon, diſable him *: tho' no perſon, when he is aſſaulted, be abſolutely obliged to betake himſelf to flight, becauſe of the danger or uncertainty of it, unleſs ther be nea rat hand a place of moſt ſecure refuge, (Pufendorff of the law of nature and nations, 2. 5. 13.). But upon this head it is proper to obſerve, that under civil governments, the time of making an unblameable ſelf-defence being confined within very narrow bounds, and indeed almoſt reduced to a point or inſtant, ſince, in ſuch a perturbation of mind, one cannot think of all the ways of eſcaping; therefore, with good reaſon, ſuch caſes ought not to be too rigidly exacted, but great allowances ought to be made.

* Much leſs then can one with right have recourſe to force and killing, after the aggreſſor deſiſts, and ſhews he is reconciled to his adverſary. Whence Ariſtides in Leuctric. 1. juſtly obſerves, "That the Thebans being diſpoſed to all that was equal, and the Lacedemonians being obſtinate, the goodneſs of the cauſe was transferred from the latter to the former." See Grotius, 2. 1. 18. and Pufendorff, 2. 5. 19.

Sect. CLXXXVI.

For what things it is lawful.

Hence we may likewiſe perceive for what things one may proceed to ſelf-defence by force and violence: for ſince ſome calamities are bitterer to man than death, and not only extreme neceſſity, but even that which may be undergone with ſafety to our life, merits favour (§ 158); the conſequence is, that what is allowable for the ſake of life, is permitted likewiſe in defence of health, the ſoundneſs of our bodies, and even our chaſtity *; and likewiſe in defence of magiſtrates, parents, children, friends, and all others whom we find in danger.

* But here many differ from us, as Auguſtinus de libero arbitrio, 1. 5. Thomaſius, Juriſp. 2. 2. 114. Buddeus Theolog. mor. part. 2. c. 3. § 3. becauſe chaſtity being a virtue of the mind, cannot be forced or extorted from us. But tho' the chaſtity of the mind be ſecure enough, yet no injury is more attrocious to a chaſte virgin or matron than a rape. Wherefore, Quintilian ſays juſtly, Declam. 349. "You have brought an injury upon the girl,

than which war hath nothing more terrible." Who then will blame an honeſt woman for defending herſelf againſt ſo high an injury, even at the expence of the raviſher's life?

Sect. CLXXXVII.

Whether it be allowable in defence of our honour and reputation?

The queſtion, whether one is excuſable for killing another in defence of his honour and reputation, *e. g.* for a box on the ear, or ſome more ſlight injury, is more difficult. But tho' nothing be more valuable, life only excepted, than honour; and therefore ſome think, that in this caſe violent ſelf-defence is not unlawful; (ſee Grotius of the rights of war and peace, 2. 1. 10.) yet becauſe the danger of loſing life, or other things upon an equal footing with life, alone give us the right to blameleſs ſelf-defence (§ 186); and becauſe honour and reputation are not loſt by an injury done to us; and there are not wanting in civil governments lawful means of revenging an injury; we cannot chooſe but aſſent to their opinion, who prudently affirm, that the right of violent ſelf-defence ceaſes in theſe caſes.

Sect. CLXXXVIII.

No perſon ought to be injured with regard to his underſtanding.

Again, the abſolute duty of not hurting any perſon extends no leſs to the *mind* than to the body (§ 178), and the faculties of the mind are *will* and *underſtanding*: as to the firſt therefore, none can deny that he greatly injures a perſon, who ſeduces into error a young perſon, or any one of leſs acute parts than himſelf by falſhood and ſpecious ſophiſtry; or who prepoſſeſſes any one with falſe opinions, or he who, even by a tedious diſagreeable method of teaching, or affected ſeverity, begets, in any one committed to his charge, an averſion to truth and the ſtudy of wiſdom *.

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* Thus Petrus did a very great injury to Maximilian I. Emp. of whom Cuſpinianus relates, p. 602. " Maximilian when he was of a proper age for being inſtructed in

letters, was put under the care of Petrus, where he learned Latin for ſome time with other fellow ſcholars of quality. But his teacher employed all his time in inculcating upon him certain logical ſubtleties, for which he had no diſpoſition or capacity; and being often whipped on that account by one who better deſerved to be whipt himſelf, ſeeing ſuch uſage is for ſlaves and not free-men, he at laſt conceived an utter diſguſt at all learning, inſtead of being in love with it." He never forgot what a detriment that was to him. The ſame Cuſpinianus tells us, that he often complained very heartily of his fate, and ſometimes ſaid at dinner, while many were preſent, "If my preceptor Petrus were alive, tho' we owe much to our teachers, I would make him repent his having had the care of my inſtitution," Add. Ger. a Roo. l. 8. p. 288.

Sect. CLXXXIX.

Nor with reſpect to the will.

Now becauſe that injury done to the *will*, which is called *corruption*, is no leſs detrimental to one; the conſequence is, that they act contrary to their duty who corrupt any perſon, by alluring him to purſue unlawful pleaſures, or to commit any vice, and either by vitious diſcourſe or example, debauch his mind; or when they have it in their power, and ought to reſtrain one from a vitious action, and reclaim him into the right courſe of life, either do it not, or ſet not about it with that ſerious concern which becomes them; but, on the contrary, do all that lies in them to forward him in his vitious carrier*.

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* How great an injury this is, Dionyſius the Sicilian tyrant well knew, who being deſirous to give pain to Dion, who he heard was levying an army, and preparing to make war againſt him, ordered his ſon "to be educated in ſuch a manner, that by indulgence he might be corrupted with the vileſt paſſions: for which effect, while he was yet a beardleſs boy, whores were brought to him, and he was not allowed to be ſober one minute, but was kept for ever carouſing, reveling and feaſting. He afterwards, when he returned to his father, could not bear a change of life, and guardians being ſet over him to reform

him from this wicked way of living he had been inured to and bred up in, he threw himſelf from the top of the houſe, and ſo periſhed." Corn. Nep. Dion. cap. 4. This art was not unknown to the Romans. Examples of treating their enemies, or their ſuſpected friends in this manner, are to be found in Tacitus Hiſt. 4. 64. and Agricola's life, 21. 1. This ſecret tyranny is taken notice of by Forſtner upon Tacitus's annals, l. 1. I wiſh then, that from ſuch examples, youth eaſily corrupted into a vitious taſte and temper, and averſe to admonitions, would learn this profitable leſſon, to look upon thoſe as their worſt enemies who endeavour to ſeduce them from the paths of virtue into luxury and ſoftneſs, and to conſider them as tyrants to whom they are really in bondage, who ſet themſelves to deprave their morals.

Sect. CXC.

Nor with reſpect to the body.

Since it is not more allowable to hurt one's *body* than his mind (§ 178), it is certainly unlawful to beat, ſtrike, hurt, injure, wound any one in any manner or degree, or to maim any member or part of his body; to torment him by ſtarving, pinching, ſhackling him, or in any other way; or by taking from him, or diminiſhing any of the things he ſtands in need of in order to live agreeably and comfortably; or, in one word, to do any thing to any one by which his body, which he received from nature ſound and intire, can, by the malice or fault of another, ſuffer any wrong or detriment. Becauſe ſince we ourſelves certainly are ſo abhorrent of all theſe things, that death itſelf does not appear leſs cruel to us than ſuch injuries do; ſurely what we would not have done to ourſelves by others, we ought not to do to them, and we muſt, for that very reaſon, or by that very feeling, know that we ought not to do ſo to them *.

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* And hence it ſeems to be, that by many ancient laws, retaliation was propoſed againſt thoſe who broke or hurt any member of another perſon. See Exod. xxi. 23. Lev. xxiv. 50. Aulus Gellius, Noct. Attic. xx. 1. Diod.

Sicul. xii. 17. For tho' it be not probable, that either among the Hebrews or the Romans, this law of retaliation took place (*κατὰ τὸ ῥητὸν*) ſtrictly : (Joſeph. antiq. Jud. 4. 7. Gellius 20. 1.) yet by this it appears, that the beſt law-givers acknowledged it to be moſt juſt, that one ſhould not do to another what he would not have done to himſelf.

Sect. CXCI.

Nor in reſpect of fame and reputation.

As to the ſtate or condition of man, to this article chiefly belongs *reputation*, not only a ſimple good name, or being looked upon not as a bad perſon, but likewiſe the ſuperior reputation one deſerves by his ſuperior merits above others; (for of wealth and poſſeſſions, which cannot be conceived without dominion or property, we are afterwards to ſpeak). Now, ſeeing one's fame cannot but be hurt by *calumnies* (§ 154), or deeds and words tending to diſgrace one, which we call *injuries*; it is as clear and certain that we ought to abſtain from all theſe, as it is, that we ourſelves take them in very ill part *.

* Therefore Simplicius upon Epictetus Enchirid. cap. 38. p. 247. calls contumelies and ſuch injuries, evils contrary to nature, nay diſeaſes, ſpots in the ſoul. But what is contrary to the nature of the mind is certainly an evil, and what is ſuch, cannot but be contrary to the law of nature, which obliges us to do good.

Sect. CXCII.

Nor in reſpect of chaſtity.

Beſides, the condition of a perſon may be wronged in reſpect of *chaſtity*, becauſe being thus corrupted by violence, or by flattery, one's good name ſuffers, and the tranquillity of families is diſturbed, (§ 178); whence it is plain, that we ought not to lay ſnares againſt one's chaſtity, and that all uncleanneſs, whether violently forced, or voluntary; and much more, adultery, and other ſuch abominable, cruel injuries, are abſolutely contrary to the law of nature *.

* For tho' when both the parties conſent, the maxim, "Do not to another what you would not have done to yourſelf," ceaſes; yet, firſt of all, in general, none deſires any thing to be done to him that would render him leſs happy. But he is more unhappy, who is allured by temptations to pleaſure, or to any vice. His will is hurt or injured (§ 189). Again, others very often are wronged, ſuch as parents, husbands, relations, and at leaſt, with regard to them, the debaucher violates the maxim, "Do not to another what you would not have done to you." Finally, he who ſeduces a woman into lewdneſs, corrupts her. But ſince, if we are wiſe, we would not chooſe to be corrupted ourſelves by guileful arts, neither ought we to have any hand in corrupting any perſon. So far is ſeduction of a woman by flattery into unchaſtity from being excuſable, that ſome lawyers have thought it deſerving of ſeverer puniſhment than force, "Becauſe thoſe who uſe force, they thought, muſt be hated by them to whom the injury is offered; whereas thoſe who by flattering inſinuations endeavour to perſuade into the crime, ſo pervert the minds of thoſe they endeavour to debauch, that they often render wives more loving and attached to them than to their husbands, and thus are maſters of the whole houſe, and make it uncertain whether the children be the husband's or the adulterer's." Lyſias, Orat. 1.

Sect. CXCIII.

One may be injured by thoughts, geſtures, words, and deeds.

From what hath been ſaid, it is plain enough that a perſon may be wronged even by internal actions; *i. e.* by *thoughts* intended to one's prejudice, as well as by external actions, as *geſtures*, *words*, and *deeds* (§ 18); whence it follows, that even hatred, contempt, envy, and other ſuch vices of the mind, are repugnant to the law of nature. And that we ought to abſtain from all geſtures ſhewing hatred, contempt, or envy, and what may give the leaſt diſturbance to the mind of any perſon. But that hurt, which conſiſts in words and deeds, is accounted greateſt (in *foro humano*) in human courts of judicature *.

* Becauſe the author of the law of nature is *καρδιογνώϛης*, *a diſcerner of hearts*, he undoubtedly no leſs violates his will, who indulges any thought contrary to his commands, than he who tranſgreſſes them by words or deeds: and for that reaſon we have obſerved above, that the law of nature extends to internal as well as external actions (§ 18). Beſides, love being the genuine principle or foundation of the law of nature (§ 79), which does not conſiſt principally in the external action, but in the deſire of good to the object beloved, and delight in its happineſs and perfection (§ 80), it muſt needs be contrary to the law of nature to hate any perſon, and to delight in his unhappineſs and imperfection: or to have an averſion to his happineſs and perfection, though it ſhould conſiſt merely in thought and internal motion, muſt be repugnant to that law. Hence our Saviour, the beſt interpreter of divine law, natural or poſitive, condemns even thoughts and internal actions repugnant to the law of nature, Matt. v. 22. 28. And this we thought proper to oppoſe to thoſe who aſſert, that the law of nature extends to external actions only.

Sect. CXCIV.

The faculty of ſpeech diſtinguiſhes man above the brute creation.

Becauſe a perſon may be hurt by *words* or *diſcourſe* (§ 193), it is worth while to enquire a little more accurately into our duties with relation to *ſpeech*. For ſuch is the bounty of the kind author of nature towards us, that he hath not only given us minds to perceive, judge and reaſon, and to purſue good, but likewiſe the faculty of communicating our ſentiments to others, that they may know our thoughts and inclinations. For tho' the brutes, we ſee, can expreſs, by neighing, hiſſing, grunting, bellowing, and other obſcure ways, their feelings *, yet to man is given the ſuperior faculty of diſtinctly ſignifying his thoughts by words, and thus making his mind certainly known to others.

* Thus a dog expreſſes anger by one ſound, grief by another, love to mankind by another, and other affections by other ſounds: but he does not diſtinctly or clearly expreſs his particular thought, nor can he do it, tho' dogs and many other animals have almoſt the ſame organs of

ſpeech with which man is furniſhed. The more imperfect an animal is, the leſs capable is it of uttering any ſound whereby it can give any indication of its ſenſations, as fiſhes, oiſters, for inſtance, and other ſhell-fiſh. And therefore Pythagoras really affronted men's underſtandings when he pretended to underſtand the language of brute animals, and to have had converſation with them, and by this ſhewed either a very fantaſtical turn of mind, or a deſign to impoſe upon others. See Iamblichus's life of Pythagoras, cap. 13.

Sect CXCV.

What diſcourſe is.

Seeing what peculiarly diſtinguiſhes us from the brutes, with relation to ſpeech, conſiſts in our being able clearly to communicate our thoughts to others, (§ 193), which experience tells us we do by articulate ſounds *; *i. e.* by ſounds ſo diverſified by our organs of ſpeech as to form different words, by which all things, and all their affections and properties or modes may be expreſſed; therefore diſcourſe is articulated ſound, by which we impart the thoughts of our minds to others diſtinctly and clearly.

* Human genius hath not reſted in finding certain and determinate names for all things, but hath invented other ſigns to be uſed in place of diſcourſe, when there is no opportunity for it. Thus we have found out the way of communicating our minds to diſtant perſons by the figures of letters ſo diſtinctly, that they do not hear but ſee our words: which is ſo ſurpriſing an invention, that ſome have aſcribed it to God. There is alſo a method of ſpeaking, as it were by the fingers, invented in Turkey by the dumb, and very familiar to the nobles in that country, as Ricaut tells us in his deſcription of the Ottoman empire, cap. 7. 12: Not to mention ſpeaking with the eyes and the feet, upon which there are curious diſſertations by Mollerus Abtorffenſis. Tho' all theſe do not deſerve to be called *ſpeech*, yet they ſupply the place of it; and therefore, whatever is juſt or obligatory with regard to ſpeech, holds equally with regard to them.

Sect. CXCVI.

How it ought to be employed.

From this definition is is obvious enough, that the faculty of ſpeech is given us, not for the ſake of God, nor of brutes, but for our own advantage, and that of our kind ; and therefore, that God wills that by it we ſhould communicate our thoughts to others agreeably to the love he requires of us : for which reaſon, he wills that we ſhould not injure any one by our diſcourſe, but employ it, as far as is in our power, to our own benefit, and the advantage of others.

* We ſay rightly, that the faculty of ſpeech was not given us for the ſake of God, ſince God without that aſſiſtance intimately knows our moſt ſecret motions and thoughts : nor for the ſake of the brutes, who do not underſtand our diſcourſe as ſuch, or any otherwiſe than they do other ſigns to which they are accuſtomed. And therefore it remains, that it can be given us for no other reaſon but for the ſake of ourſelves and other men. But it cannot be given us for our own ſake, in order to our communicating our thoughts to ourſelves, of which we are immediately conſcious ; but that we may inform others what we would have done to us, and in what they may be uſeful to us. And for the ſake of others it is given to us, that we may ſignify to them what it is their intereſt to know, or what may be of uſe to them. Since therefore we ought to love others equally as ourſelves, and what we would not have others to do to us, we ought not to do to others ; the plain conſequence is, that we are obliged not to hurt any one by our diſcourſe, but to endeavour to be as uſeful as we can to others by it.

Sect. CXCVII.

We ought to uſe words in their received ſignification.

The deſign of diſcourſe being to communicate our ſentiments to others (§ 196), which is done by articulate ſounds, denominating things, and their affections, modes, qualities, and properties (§ 195) ; it follows, that being to ſpeak to others, we ought not to affix any meaning to words but what they are intended and uſed to ſignify in common diſcourſe ;

or if we make uſe of uncommon words, or employ them in a leſs ordinary acceptation, we ought accurately to explain our mind. But no perſon has reaſon to be diſpleaſed, if we uſe words in a ſenſe they have been taken in by thoſe acquainted with languages, or which is received at the preſent time, if the conſtruction of words and other circumſtances admit of it.

Sect. CXCVIII.

No perſon ought to be wronged by diſcourſe.

And ſince God wills that we communicate the ſentiments of our mind to others by ſpeech, agreeably to the love of others he requires of us by his law (§ 196); which love does not permit us to hurt any perſon by our diſcourſe: but it is to injure a perſon, to detract any thing from his perfection or felicity (§ 82): hence it follows, that we ought, not to hide from any one any thing, the knowledge of which he hath either a perfect or imperfect right * to exact from us; not to ſpeak falſhood in that caſe: not to miſlead any perſon into error, or do him any detriment by our diſcourſe.

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* *Perfect right* is the correlate to perfect obligation, *imperfect right* to imperfect obligation. The former requires that we ſhould not wrong any perſon, but render to every one his own (§ 174): And therefore every one can as often demand from us by perfect right the truth, as he would be hurt by our diſſimulation, by our ſpeaking falſely, or by our diſguiſing and adulterating the truth: or as often as by compact, or by the nature of the buſineſs itſelf which we have with another, we owe it to him to ſpeak the truth. And ſince the latter obliges us by internal obligation, or regard to virtue, to promote the perfection and happineſs of others to the utmoſt of our power, it is very manifeſt that we are obliged to ſpeak the truth openly, and without diſſimulation, as often as another's happineſs or perfection may be advanced by our diſcourſe. He therefore offends againſt the perfect right of another, who knowing ſnares to be laid for him by an aſſaſſin, conceals it, or perſuades him that the aſſaſſin only comes

to him to pay his compliments; as likewiſe does he, who having undertaken the cuſtody of another's goods, knowingly hides the breaking in of thieves, or endeavours to make them paſs for travellers come to lodge with him. He acts contrary to the imperfect right of another, who when one is out of his way, denies he knows the right road, tho' he know it, or directly puts him into the wrong one.

Sect. CXCIX.

We may hurt another by diſſimulation, by lying, by deception.

He who conceals what another has a perfect or imperfect right to demand certain and true information of from him, *diſſembles*. He who in that caſe ſpeaks what is falſe, in order to hurt another, *lies*. Finally, he who miſleads any one to whom he bears ill-will into an error, *deceives* him. Now, by theſe definitions, compared with the preceding paragraph, it is abundantly plain, that diſſimulation, as we have defined it, and all lying and deception, are contrary to the law of nature and nations.

Sect. CC.

When it is allowable to be ſilent, to ſpeak falſly or ambiguouſly.

But ſince we are bound to love others, not with greater love than ourſelves, but with equal love, (§ 94); the conſequence is, that it is lawful to be ſilent, if our ſpeaking, inſtead of being advantageous to any perſon, would be detrimental to ourſelves or to others: and that it is not unlawful to ſpeak falſly or ambiguouſly, if another have no right to exact the truth from us (§ 198); or if by open diſcourſe to him, whom, in decency, we cannot but anſwer, no advantage would redound to him, and great diſadvantage would accrue from it to ourſelves or others; or when, by ſuch diſcourſe with one, he himſelf not only ſuffers no hurt, but receives great advantage.

* Thus, none will blame a merchant, if being asked by ſome over curious perſon how rich he might be, he ſhould not make any anſwer, or ſhould turn the converſation ſome other way. Nor ought a General more to be blamed

who deceives the enemy by falſe reports or ambiguous rumours, becauſe an enemy, as ſuch, hath no right, perfect or imperfect, to demand the truth from an enemy as ſuch. Moreover, the prudence of Athanaſius is rather commendable than blameable, who detained thoſe who were purſuing him with ſuch ambiguous converſation, that they knew not it was Athanaſius with whom they were converſing, Theodoret. Hiſt. Eccl. 3. 8. For he could not remain ſilent without danger, and plain diſcourſe would not have been of any advantage to his purſuers, and of great hurt to himſelf. Finally, none can doubt but a teacher may lawfully employ fables, fictions, parables, ſymbols, riddles, in order to ſuit himſelf to the capacity of his hearers, and inſinuate truth into their minds through theſe channels, ſince theſe methods of inſtruction are far from being hurtful to any perſons, and are very profitable to his hearers.

Sect. CCI.

What is meant by taciturnity, what by falſe ſpeech, and what by fiction.

Hence we may infer, that all *diſſimulation* is unjuſt (§ 199), but not all *ſilence:* (by which we mean, not ſpeaking out that to another which we are neither perfectly nor imperfectly obliged to diſcover to him (§ 200;) that all *lying* is unjuſt (§ 199), but not all *falſe ſpeaking* (§ 200); that all *deception* is unjuſt (§ 199); but not all *ingenious* or *feigned diſcourſe* (§ 200). And therefore all theſe muſt be carefully diſtinguiſhed, if we would not deceive ourſelves, and make a falſe judgment concerning them *.

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* Amongſt the Greeks the word ψεῦδος was ſomewhat ambiguous, ſignifying both *a lie* and *falſe ſpeech.* Demoſthenes takes it in the firſt ſenſe in that ſaying ſo familiar to him, "That there is nothing by which we can hurt others more than by (ἢ ψεύδη λέγων) lies." Chariclea underſtands by it falſe ſpeech, in that famous apophthegm of his, "That falſe ſpeaking (τὸ ψεῦδος) is ſometimes good, *viz.* when it is in ſuch a manner advantageous to the ſpeaker as to hurt no other body." Heliod. Æthiop. l. 1. c. 3. p. 52. But the word *lie* is not one of theſe ambiguous words, but being always uſed to ſignify a baſe and

deteſtable vice, ought to be diſtinguiſhed from falſe ſpeaking, and the other words we have above mentioned.

Sect. CCII.

What truth and veracity mean.

The ſame holds with reſpect to *truth* and *veracity*. For ſince one is ſaid to be a perſon of *veracity*, who ſpeaks the truth without diſſimulation, whenever one has a perfect or imperfect right to know the truth from us; the conſequence is, that *veracity* always means a commendable quality. On the other hand, ſpeaking *truth* may be good, bad, or indifferent; becauſe it conſiſts in the agreement of words and external ſigns with our thoughts, and one does not always do his duty who lays open his thoughts *.

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* It is a known apophthegm of Syracides. (*ſapienti os in corde, ſtulto cor in ore eſſe*, a wiſe man's mouth is in his heart, and a fool's heart is in his mouth). A rich perſon who diſcovers his treaſures to thieves tells truth, but none will on that account commend his virtue and veracity: whereas, on the other hand, he would not be reproached with making a lie who kept ſilent to a thief, or turned the diſcourſe another way (§ 200). Hence the ſaying of Simonides, "That he had often repented of ſpeaking, but never of ſilence." And that of Thales, "That few words are a mark of a prudent man." To which many ſuch like aphoriſms might be added.

Sect. CCIII.

What is meant by an aſſeveration, what by an oath, what by benediction, and what by imprecation.

Words, by which we ſeriouſly aſſert that we are ſpeaking truth, and not falſly, are called *aſſeverations*. An aſſeveration made by invoking God as our judge, is called an *oath*. Words by which we wiſh good things to a perſon, or pray to God for his proſperity, are called *benedictions*. Words by which we, in the heat of our wrath, wiſh ill to our neighbour, is commonly called *malediction* or *curſing*. When we imprecate calamities upon our own heads, it is called *execration*.

Sect. CCIV.

When it is allowable to uſe aſſeverations.

From the definition of an aſſeveration (§ 203), it is plain that no good man will uſe it raſhly or unneceſſarily, but then only, when a perſon, without any cauſe, calls what he ſays into doubt, and he cannot otherwiſe convince him of the truth whoſe intereſt it is to believe it; whence we may conclude, that he acts greatly againſt duty, who employs aſſeverations to hurt and deceive any one.

* For ſince to circumvent and deceive a perſon, is itſelf baſe and unjuſt (§ 199), what can be more abominable or unjuſt, than to deceive by aſſeverations? And hence that form uſed among the Romans, "As among good men there ought to be fair dealing," "That I may not be taken in and deceived by putting truſt in you, and on your account." Cicero, de off. l. 3. 16. For it is baſe to cheat and defraud any one; and it is much more baſe to cheat and defraud by means of one's credit with another. See Franc. Car. Conradi de pacto fiduc. exerc. 2. § 4.

Sect. CCV.

When it is allowable to uſe benedictions, and when imprecations.

Since we deſire happineſs no leſs to thoſe we love, and in whoſe felicity we delight, than to ourſelves, it cannot be evil to wiſh well to another, and pray for all bleſſings upon him, provided it be done ſeriouſly and from love, and not cuſtomarily and in mere compliment*. But all maledictions breath hatred, and are therefore unjuſt, unleſs when one with commiſeration only repreſents to wicked perſons the curſes God hath already threatened againſt their practices. Finally, execrations, being contrary to the love we owe to ourſelves, and the effects of immoderate anger and deſpair, are never excuſable; but here, while we are examining matters by reaſon, certain heroic examples do not come into the conſideration, they belong to another chair.

* And therefore many congratulatory acclamations, which on various occaſions are addreſſed to illuſtrious perſons

ſons and men in power, degenerate into flatteries: nay, ſometimes they are poiſon covered over with honey, becauſe at the very time theſe fair ſpeeches are made, the perſon's ruin is deſired, if ſnares be not actually laid for him. Since all this proceeds not from love but hatred, who can doubt of their being repugnant to the law of nature, which is the law of love?

Sect. CCVI.

What is the uſe of an oath?

As to an *oath*, which is an aſſeveration by which God is invoked as a witneſs or avenger (§ 203), ſince we ought not to uſe a ſimple aſſeveration raſhly or unneceſſarily (§ 204); much leſs certainly ought we to have recourſe raſhly or unneceſſarily to an oath; but then only when it is required by a ſuperior as judge; or by a private perſon, in a caſe where love obliges us to ſatisfy one fully of the truth, and to remove all ſuſpicion and fear of deception and falſity. And this takes place with regard to every oath, and therefore there is no need of ſo many diviſions of oaths into *promiſſory* and *affirmatory*, and the latter into an oath for bearing *witneſs*, and an oath deciſive of a *controverſy*: for the ſame rules and conditions obtain with reſpect to them all *.

* Beſides, if we carefully examine the matter, we ſhall find that every oath is *promiſſory*. For whoever ſwears, whether the oath be impoſed by a judge, or by an adverſary, he promiſes to ſpeak the truth ſincerely and honeſtly. And the diſtinctions between oaths about contracts paſt or future, the former of which is called *an oath of confirmation*, and the other *a promiſſory oath*; an oath about the deed of another, and an oath about our own deed, the former of which is called *an oath of teſtimony*, the other *a deciſory oath*, which again, if it be tendered by the judge is called *judicial*, if by the party, without judgment, *voluntary*: theſe and other deciſions belong rather to Roman law than to Natural law, as is plain from their not being in uſe in ſeveral other nations, as the Greeks and Hebrews. See Cod. Talmud. tom. 4. edit. Surenhuſ. Maimonides de jurejurando, edit. Diethmar. Leiden 1706. Selden de Synedr. Heb. xi. 11. Jac. Ly-

dius de juramento. To which may be added what Petit and other writers on antiquities ſay of the uſe of an oath among the Greeks.

Sect. CCVII.

Who and how.

Since by thoſe who ſwear God is invoked as a witneſs and avenger (§ 203), the conſequence is, that atheiſts muſt make light of an oath, and that it is no ſmall crime to tender an oath to ſuch perſons; that an oath ought to be ſuited to the forms and rites of every one's religion *; and therefore aſſeverations by things not reckoned ſacred, cannot be called oaths; that he is juſtly puniſhed for perjury, who perjures himſelf by invoking falſe gods; nay, that even an atheiſt is juſtly puniſhed for perjury, who concealing or diſſembling his atheiſtical opinions, ſwears falſly by God, ſeeing he thereby deceives others.

* Provided the form doth not tend to diſhonour the true God, becauſe ſuch actions are not excuſable even by extreme neceſſity (§ 160). Hence it is plain, that an oath tendered to a Jew may be ſuited to his religion, becauſe ſuch a form contains nothing which tends to the diſhonour of the true God. But I doubt whether it be lawful for a Chriſtian judge to order a Mahometan to ſwear before him by Mahomet, as the greateſt prophet of the one God, eſpecially ſince the nature of the Mahometan religion is not ſuch, that an oath by the true God, the Creator of heaven and earth, does not equally bind them to truth, as if they at the ſame time made mention of that impoſtor.

Sect. CCVIII.

How an oath ought to be adminiſtred.

Moreover, ſince one ought not to ſwear raſhly, or without being called to it (206); hence it follows, that an oath is made for the ſake, not of the ſwearer, but of him who puts it to the ſwearer; and therefore it ought to be underſtood and explained by his mind and intention, and not according to that of the perſon ſworn; for which reaſon, all thoſe equivocations and mental reſervations, as they are called, by which wicked men endeavour to elude the obligation of an oath, are moſt abſurd. Thoſe interpretations of oaths are likewiſe abſurd, which require baſe or unreaſonable things of one, who of his own accord had ſworn to another not to refuſe him any thing he ſhould ask of him *.

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* Tho' he be guilty in many reſpects, who takes ſuch an oath, becauſe he does it of himſelf, unneceſſarily and without being called to it (§ 206); and becauſe he thus ſwears before hand not to refuſe, without knowing what the perſon may demand, and ſo expoſes himſelf either to the danger of perjury, or of a raſh oath: yet by ſuch an oath no perſon is bound to fulfil what he promiſed by his oath, if the other, taking advantage of it, requires any thing of him that is impoſſible, unjuſt or baſe. For ſince he ſwore voluntarily, and of his free accord, his oath ought without doubt to be interpreted according to his own mind and intention. But no man in his ſenſes can be ſuppoſed to mean, to bind himſelf to any thing which cannot be done, either through phyſical impoſſibility, or on account of legal prohibition. Herod therefore ſinned, Mat. xiv. in promiſing to his daughter by a raſh oath to grant her whatever ſhe ſhould demand of him; but he was yet more guilty in yielding to her when ſhe deſired John the Baptiſt's head.

Sect. CCIX.

The obligation and effects of an oath.

Again, an oath being an invocation of God, (§ 203), it follows that it ought to be religiouſly fulfilled; that it cannot be eluded by quibles and equivocations, but that the obligation of an oath muſt yield to that of law: and therefore that it can produce no obligation, if one ſwears to do any thing that is baſe and forbidden by law; tho' if it be not directly contrary to law, it be abſolutely binding, provided it was neither extorted by unjuſt violence, nor obtained by deceit (§ 107 & 109): whence is manifeſt what ought to be ſaid of the maxim of the *canoniſts*, " That every oath ought to be performed which can be ſo without any detriment to our eternal happineſs."

* It comes under the definition of *evaſion*, *cavillatio*, if one ſatisfies the words, but not the mind and intention of the impoſer: the impiety of which is evident. He who thinks of ſatisfying an oath by evaſion or equivocation, deceives another. But to deceive any perſon is in itſelf unjuſt (§ 199): it muſt be therefore much more unjuſt to deceive one by invoking God to witneſs, and as judge and avenger. An oath then excludes all cavils. Hence it is plain that Hatto archbiſhop of Mentz was guilty of perjury, when, having promiſed to Albertus, that he would bring him back ſafe to his caſtle, pretending hunger, he brought him back to breakfaſt, thinking that he had thus ſatisfied his oath. Otto Friſing. Chron. 6. 15. Marian. Scot. ad ann. 908. Ditmarus Merſeb. l. 1. at the beginning, wonders at this ſubtlety of the archbiſhop, and he had reaſon, ſince even the Romans would not have ſuffered a captive to eſcape without ſome mark of ignominy who had by ſuch guile deceived an enemy, Gell. Noct. Att. 7. 18. Of ſuch fraud Cicero ſays juſtly in his third book of offices, cap. 32. " He thought it a ſufficient performance of his oath: but certainly he was miſtaken: for cunning is ſo far from excuſing a perjury, that it rather aggravates it, and makes it the more criminal. This therefore was no more than a fooliſh piece of craftineſs, impudently pretending to paſs for prudence: whereupon the ſenate took care to order, that my crafty gentleman ſhould be ſent back in fetters again to Hannibal."

Sect. CCX.

He who does an injury, is obliged to make reparation.

We have ſufficiently proved that it is unlawful to hurt any one by word or deed, nay even in thought. Now, ſince whoſoever renders another more unhappy, injures him; but he renders one moſt unhappy, who, having injured him, does not repair the damage; the conſequence is, that he who does a perſon any injury, is obliged to make reparation to him; and that he who refuſes to do it, does a freſh injury, and may be truly ſaid to hurt him again; and that if many perſons have a ſhare in the injury, the ſame rule ought to be obſerved with regard to making ſatisfaction and reparation, which we laid down concerning the imputation of an action in which ſeveral perſons concur (§ 112 & ſeq.)*.

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* Ariſtotle Ethic. ad Nicom. 5. 2. derives the obligation to make reparation from an involuntary contract: Pufendorff of the law of nature and nations, 3. 1. 2. deduces it from this conſideration, that the law againſt doing damage would be in vain, unleſs the law-giver be likewiſe ſuppoſed to will that reparation ſhould be made. But we infer this duty from the very idea of wrong or hurt. For he does not render us more imperfect or unhappy who robs us of any thing belonging to us, than he who having robbed us, does not make reſtitution or ſatisfaction. If therefore injury be unlawful, reparation or ſatisfaction muſt be duty.

Sect. CCXI.

What is ſatisfaction?

By *ſatisfaction* we here underſtand doing that which the law requires of one who has done an injury. Now, every perfect law requires two things, 1. That the injury be repaired*, becauſe a perſon is hurt or wronged. 2. That the injurious perſon ſhould ſuffer for having tranſgreſſed the law by doing an injury, becauſe the legiſlator is leaſed by his diſobedience or tranſgreſſion. And for this reaſon ſatisfaction comprehends both reparation and puniſhment, (Grotius of the rights of war and peace, 2. 17. 22. & 120). The one doth not take off the other, becauſe the guilt of the action for which puniſhment is inflicted, and the damage that is to be repaired, are conjunct in every delinquency. But of puniſhment in another place.

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* If damage be done by the action of no perſon, no perſon is obliged to ſatisfaction; for what happens ſolely by divine providence, cannot be imputed to any mortal (§ 106). And hence it follows, that when a proprietor ſuffers any damage in this way, he is obliged to bear it.

For what is imputable to no perſon we muſt ſuffer with patience.

Sect. CCXII.

How it is to be made.

Damage done, is either of ſuch a nature that every thing may be reſtored into its former ſtate, or that this cannot be done. In the former caſe, the nature of the thing requires that every thing ſhould be reſtored into its firſt ſtate, and, at the ſame time, that the loſs ſhould be repaired which the injured perſon ſuffered by being deprived of the thing, and by the expences he was obliged to in order to recover it. In the latter caſe, the nature of the thing requires, that the perſon wronged ſhould be indemnified by as equal a valuation of his loſs as can be made; in which regard is to be had not only to the real value, but to the price of fancy or affection. Pufendorff hath illuſtrated this doctrine by examples in murder, in maiming, in wounding, in adultery, in rapes, in theft, and other crimes. Puf. of the law of nature and nations, B. 3. c. 1.

REMARKS on this Chapter.

We ſhall have occaſion afterwards to conſider a little more fully with our Author, that natural equality of mankind upon which he founds our natural obligation to mutual love. Let me only obſerve here, that it is at leaſt an improper way of ſpeaking among moraliſts to ſay, "That all men are naturally equal in this reſpect, that antecedently to any deed or compact amongſt them, no one hath power over another, but each is maſter of his own actions and abilities; and that none are ſubjected to others by nature." For we ought, as in phyſicks, ſo in morals, to reaſon from the real ſtate, frame, conſtitution, or circumſtances of things. And with regard to mankind, abſtractly from all conſideration of inequality occaſioned by civil ſociety, this is the true ſtate of the caſe: 1. "That men are born naturally and neceſſarily ſubject to the power and will of their parents; or dependent upon them for their ſuſtenance and education. The author of nature hath thus ſubjected us. 2. Men are made to acquire prudence by experience and culture; and therefore naturally and neceſſarily thoſe of leſs experience and leſs prudence, are ſubjected to thoſe of greater experience and prudence. There is naturally this dependence among mankind. Nay, 3. which is more, the Author of nature (as

Mr. Harrington ſays in his Oceana) hath diffuſed a natural ariſtocracy over mankind, or a natural inequality with reſpect to the goods of the mind. And ſuperiority in parts will always produce authority, and create dependence, or *hanging by the lips*, as the ſame author calls it. Such ſuperiority and inferiority always did univerſally prevail over the world; and the dependence or ſubjection which this ſuperiority and inferiority in parts or virtues creates, is natural. 4. Induſtry, to which, as the ſame excellent author ſays, *nature or God ſells every thing*, acquires property; and every conſequence of property made by induſtry is natural, or the intention of nature. But ſuperiority in property purchaſed by induſtry, will make dependence, *hanging*, as that author calls it, *by the teeth*. Here is therefore another dependence or ſubjection amongſt mankind, which is the natural and neceſſary reſult of our being left by nature each to his own induſtry." All theſe inequalities, or ſuperiorities and dependencies, are natural to mankind, in conſequence of our frame and condition of life. Now the only queſtion with regard to theſe ſuperiorities, and the right or power they give, muſt be either, 1. "Was it right, was it juſt and good to create mankind in ſuch circumſtances, that ſuch inequalities muſt neceſſarily happen among them?" To which queſtion, becauſe it does not belong immediately to our preſent point, it is ſufficient to anſwer, "That we cannot conceive mankind made for ſociety, and the exerciſe of the ſocial virtues without mutual dependence; and mutual dependence neceſſarily involves in its very idea inequalities, or ſuperiorities and inferiorities: and that as we cannot conceive a better general law, than that the goods of the mind, as well as of the body, ſhould be the purchaſe of application and induſtry; ſo the advantages ariſing from ſuperiority in the goods of the mind, or from ſuperiority in external purchaſes by ingenuity and induſtry, *i. e.* the authority the one gives, and the power the other gives, are natural and proper rewards of ſuperior prudence, virtue and induſtry." 2. Or the queſtion muſt mean, "Does it appear from our conſtitution, to be the intention of our Author, that man ſhould exerciſe his natural or acquired parts and goods for the benefit of his kind, in a benevolent manner, or contrariwiſe?" To which I anſwer, "That as it plainly appears from our conſtitution to be the intention of our Author, that we ſhould exerciſe our natural abilities to the beſt purpoſe, for our own advancement in the goods of the mind and of the body; and that we ſhould improve in both, and reap many advantages by improvement in both, the chief of which is ſuperiority over thoſe who have not made equal advances either in internal or external goods: ſo it as plainly appears from our conſtitution, to be the will and intention of our Author, that we ſhould love one another, act benevolently towards one another, and never exerciſe our power to do hurt, but on the contrary, always exerciſe it or increaſe it, in order to do good." If this appears to be the will of our Maker, from the conſideration of our conſtitution and condition of life, then to act and behave ſo is right; and to act or behave otherwiſe is wrong, in every ſenſe of theſe words, *i. e.* it is contrary to the end of our make; and conſequently repugnant to the will and intention of our Maker. Now, that we are made for benevolence; and are under obligation by the will of our Maker, to promote the good of others to the utmoſt of our power, will be fully proved, if it can be made out, that we are under obligation by the will of our Maker, appearing from our make and conſtitution, to forgive injuries, to do good even to our enemies, and in one word, to overcome evil by good. If the greater can be proved, the leſſer involved in it, is certainly proved. And therefore, if it can be made appear, that by the law of nature, (in the ſenſe we have defined theſe words) we are obliged to benevolence, even towards our enemies, all that our Author hath ſaid about not injuring one by word or deed, or even by thought; and about the caution and tenderneſs that ought to be uſed in neceſſary ſelf-defence, will be indiſputable. Now, that it appears to be the will of our Author, from our make, that we ſhould be benevolent even to the injurious and ungrateful, muſt be owned by any one who conſiders, that reſentment in us is indignation againſt injuſtice or injury; is not, or cannot be otherwiſe excited in us; and therefore is not in the leaſt a-kin to malice; and that as reſentment is natural to us, ſo likewiſe is compaſſion. For if both theſe paſſions be in us, and we have Reaſon to guide them, as we plainly have, it is clear, that they muſt be intended to operate conjointly in us, or to mix together in their operations. Now what is reſentment againſt injury, allayed or tempered by compaſſion, under the direction of reaſon, but ſuch reſentment as the ſuppreſſion of injuſtice requires, moderated by tenderneſs to the unjuſt perſon? And what is compaſſion, allayed, mixed or moderated by reſentment againſt injuſtice, but ſuch tenderneſs towards the injurious perſon himſelf, as the preſervation of juſtice, and conſequently of ſocial commerce and public good, permits? This argument is fully illuſtrated in my *Chriſtian Philoſophy*, p. 395, *&c.* And therefore I ſhall not here inſiſt any longer upon it. The ſame thing may be proved, and hath been fully proved by moraliſts from other conſiderations. But I chooſe to reaſon in this manner, that we may ſee how reaſonings about duties may proceed in the ſame manner as phyſical reaſonings about the uſes of parts in any bodily frame, or the final cauſe of any particular bodily whole. For if it be good reaſoning to ſay, any member in a certain bodily organization is intended for ſuch an end in that compoſition, it muſt be equally good reaſoning to ſay, a moral conſtitution, in which there is a ſocial and benevolent principle, compaſſion, and many public affections, and no hatred or averſion or reſentment, but againſt injuſtice, together with reaſon capable of diſcerning public good, and delighting in it, is intended by its Author for the exerciſes of ſocial affections; for juſtice; nay, for benevolence, and for commiſerating even the injurious, as far as public good admits that tenderneſs to take place.

Having mentioned the neceſſity of reaſoning from the frame of mankind, and our condition, in order to infer the will of our Creator concerning our conduct, it may not be improper to add, That there is no difficulty in determining the will of our Creator, even with reſpect to our conduct towards inferior animals, if we ſtate the caſe as it really is in fact, which is, "That ſuch is the condition of mankind by the will of our Maker, that our happineſs cannot at all be procured without employing certain inferior animals in labouring for us; nor even the happineſs of the inferior animals themſelves, in a great meaſure." For that being the caſe, tho' we can never have a right to employ inferior animals for our ſervice by compact, they being incapable of it, yet we have a natural right to it, a right ariſing from the circumſtances of things, as they are conſtituted by the Author of nature. But the right which ariſes from theſe circumſtances, is not a right to torment them unneceſſarily, becauſe not only our happineſs does not require that, but we really are framed by nature even to compaſſionate ſuffering brutes. But we ſhall have occaſion afterwards to ſhew more fully, that a right may ariſe from the nature and circumſtances of things, previous to compact or conſent; or where there cannot be any compact or conſent. Whoever would ſee the true meaning of the precept, *to love our neighbours as ourſelves*, fully and clearly laid open, may conſult Dr. Butler's ſermon already quoted upon the love of our neighbour. That the precept, *Do as you would be done by*, is not peculiar to Chriſtianity, but is a precept of the law of nature, and was known and inculcated by Confucius, Zoroaſter, Socrates, and almoſt all ancient moraliſts, Pufendorff hath ſhewn, and Mr. Barbeyrac in his hiſtory of the moral ſcience, prefixed to his notes on Pufendorff's ſyſtem: ſo likewiſe our Author in the following chapter.

CHAP. VIII.

Concerning our imperfect duties towards others.

Sect. CCXIII.

The order and connexion.

WE think our obligation not to hurt any perſon, and the nature of injury have been ſufficiently cleared and demonſtrated. The next thing would be to explain with equal care our obligation to render to every one his own, and the nature of that duty (§ 175); were not the nature of our hypothetical duties ſuch, that they could not be explained without having firſt conſidered the nature of our imperfect abſolute duties. But this being the caſe, it is proper to begin with them; and this premonition is ſufficient to ſkreen us againſt being charged with the crime reckoned ſo capital among the critics of this age (ne ὕϛερον πρότερον) tranſgreſſing order deſignedly, and with evil intention.

Sect. CCXIV.

The foundation and diviſion of imperfect duties.

The ſource of all theſe duties is *love of humanity* or *beneficence* (§ 84), by which we cheerfully render him whom we love, not merely what we owe him by ſtrict and perfect right, but whatever we think may conduce to his happineſs. But becauſe *humanity* commands us to be as good to others as we can be without detriment to ourſelves; and *beneficence* commands us to do good to others even with detriment to ourſelves (§ 83); therefore our *imperfect duties* are of two kinds, and may be divided into thoſe of *humanity*, or *unhurt utility*, and thoſe of *beneficence* or *generoſity*. Both are, for many reaſons, or on the account of many wants, ſo neceſſary, that it is impoſſible for men to live agreeably or conveniently without them.

Sect. CCXV.

Axioms concerning them.

Since there can be no other meaſure with reſpect to theſe duties but the love of ourſelves, and therefore we are obliged to love others as ourſelves, (§ 93); the conſequence is, that whatever we would have others to do to us, we ought to do the ſame to them (§ 88); whence above, in premiſing a certain principle to which all our duties to others might be reduced, we laid down this rule, *Man is obliged to love man no leſs than himſelf, and not to do to any other what he would think inexcuſable if done to himſelf*, (from which principle we have deduced our perfect duties); *but, on the contrary, to do to others what he would deſire others to do to him* (§ 93). Now hence we ſhall ſee that all our imperfect duties may be clearly inferred.

Sect. CCXVI.

Our obligation to the duties which may be done to others without detriment to ourſelves.

Firſt of all, none would have thoſe things denied to him by others which they can render to him without hurting themſelves; wherefore every one is obliged liberally to render ſuch good offices to another; and conſequently it is juſtly reckoned moſt inhuman for one, when it is in his power, not to aſſiſt another by his prudence, his counſel and aid; or not to do all in his power to ſave his neighbour's goods; not to direct a wanderer into the right road; to refuſe running water to the thirſty; fire to the cold; ſhade to thoſe who languiſh with exceſſive heat; or to exact any thing from another to his detriment, which can more eaſily, either without hurting ourſelves or any other, be procured ſome other way. This kind of benignity is ſo ſmall and trivial, that either by law or cuſtom, the duties of this claſs have paſſed almoſt every where into duties of perfect obligation *.

Sect. CCXVII.

It extends to thoſe things with which we abound.

It belongs to the ſame claſs of unhurt utility to communicate ſuch things to others as we can, (ſuch

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* Thus, among the Athenians, it was reckoned a moſt attrocious crime not to direct one who wandered, into his right road. Hence that ſaying of Diphilus, "Don't you know that it is amongſt the moſt execrable things, not to ſhew one his way." So by the Roman laws, one could by an action compel another, who was neither bound to him by any compact, nor by delinquency, to exhibit a thing. Latona in Ovid. Metamorp. 6. v. 349. appeals to cuſtom,

Quid prohibetis aquas? uſus communis aquorum eſt.

And Seneca, Controv. 1. ſays, "It is barbarous not to ſtretch out our arms to one who is falling, this is the common right of mankind," (*commune jus*) that is, a common right or duty by the conſent of all nations.

(ſuch is our abundance), ſpare them without any loſs or hurt to ourſelves; and to diſpenſe among others things which would otherwiſe be loſt and periſh with us; inſomuch, that they are very inhuman who ſuffer things to corrupt and ſpoil, who deſtroy in the fire, throw into the ſea, or bury under ground things on purpoſe that no other may be the better for them *.

* This is alſo a very common ſort of humanity, or another very low degree of it. As therefore, they are very cruel and inhuman, who refuſe ſuch good offices to others, ſo they are very unequal prizers of their actions, who expect very great thanks on account of any ſuch good deeds. Terent. And. 2. 1. v. 31. ſays well, " It is not a mark of a liberal caſt of mind, to deſire thanks when one hath merited none." But who thinks the Calabrian did any conſiderable favour to his gueſt? to which Horace alludes, Ep. 1. 7. v. 14.

Non quo more piris veſci Calaber jubet hoſpes.
Tu me feciſti locupletem. Veſcere ſodes.
Jam ſatis eſt. At tu quantumvis tolle. Benigne:
Non inviſa feres pueris munuſcula parvis.
Tam teneor dono, quam ſi dimittor onuſtus.
Ut libet: hæc porcis hodie comedenda relinques.
Prodigus & ſtultus donat, quæ ſpernit & odit.

He is inhuman who can deny ſuch things to thoſe who ſtand in need of them: and he is more than inhuman, who when he gives them, appears to himſelf ſo wonderfully beneficent, that he would have a perſon think himſelf under perpetual and unpayable obligation to him on that account.

Sect. CCXVIII.

What if our humanity would be hurtful to ourſelves?

But ſince we are bound to render ſuch good offices to others from the love we are obliged to entertain towards others by the law of an infinitely good and merciful God (§ 215), and yet none is obliged to love another more than himſelf (§ 93); the conſequence is, that we may deny theſe good offices to others, if we foreſee the doing them may be detrimental to ourſelves or our friends; which, ſince it may eaſily happen in a ſtate of nature, where there is no common magiſtracy to protect and ſecure us, if we readily render theſe good offices even to our manifeſt enemies; there is therefore a plain reaſon why the good offices, even of *harmleſs uſe*, may be refuſed to an enemy in that ſtate, as being ill diſpoſed towards us; whereas in a civil ſtate to deny them raſhly to others under that pretext, would be very blamea ble.

* Thus in war we deny our enemies the benefit of watering, and have even a right to corrupt proviſions, that they may be of no advantage to our invaders. But all theſe things we have only a right to do as they are enemies. For otherwiſe, when they cannot hurt us, it is humanity that deſerves praiſe to aſſiſt enemies, e. g. when they are in captivity or in ſickneſs. And ſeeing in a civil ſtate, an enemy cannot eaſily hurt us, whom at leaſt the magiſtrate cannot reduce into order, he is moſt inhuman who refuſes to an enemy, to a ſcelerate, the offices of innocent profit or unhurt utility, ſince he is an object of commiſeration: "*If not the manners, yet the man, or if not the man, at leaſt humanity*," according to that excellent ſaying of Ariſtotle in Diogenes Laert. v. 21. For which reaſon, the inhumanity of the Athenians is ſcarcely excuſable, " who had ſuch an averſion to the accuſers of Socrates, that they would neither lend them fire, nor ſo much as anſwer them when they ſpoke, nor bath in the ſame water which they had uſed, but would order their ſervant to pour it away as polluted and defiled, till impatient of ſuch a miſerable ſtate of reproach, the wretches became their own executioners." Plutarch. de invid. & odio. p. 538.

Sect. CCXIX.

Humanity is due to enemies.

Yea rather, ſince the love which is the ſource of all theſe duties, is due, not for the merits of others, but on account of the equality of nature (§ 88), it is very evident, that even to enemies thoſe things in which we abound, and which we can give them without any hurt to ourſelves, ought to be given. And this humanity is ſo much the more ſplendid and noble, the leſs hope there is of our ever returning into great friendſhip with the enemy to whom ſuch ſervices are rendered *.

Sect. CCXX.

The degrees of relation and affinity ought to be conſidered.

But becauſe this love of humanity, from which theſe duties flow as their fountain or ſource, ought to have prudence for its director, which is that faculty by which things conducive to our own happineſs and that of others is diſcerned; hence it is conſpicuous, that regard ought to be had not only to perſons, but to the neceſſities they labour under; and therefore in like circumſtances, if it be not in our power to ſatisfy all, greater humanity is due to a good man than to a ſcelerate; more is owing to a friend than to an enemy; more to a kinſman and relative than to a ſtranger; and more to him who is in greater, than to him who is in leſs indigence of our aſſiſtance; and therefore ſo far the illuſtrious Leibnitz defines very juſtly, juſtice to be *the love of a wiſe man* *.

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* We know this is inculcated upon Chriſtians, Mat. v. 45. Luke vi. 35; and before their eyes the example of our heavenly Father is ſet, "Who maketh the ſun to ariſe, and his rain to fall upon the juſt and the unjuſt." But that right reaſon, from the conſideration of the equality of human nature, may diſcover this truth, is plain from hence, that Socrates ſet himſelf expreſly to refute this vulgar maxim, "That we are to do good to our friends, and hurt to our enemies." So Themiſtius tells us, Orat. ad Valent. de bello victis. And what could have been wrote by one unacquainted with the ſacred books, more excellent than this paſſage of Hierocles on the golden verſes of Pythagoras, p. 69. "Whence it is juſtly ſaid, that a good man hates no perſon, but is all love and benignity. For he loves the good, and does not regard the evil as his enemies. If he ſeeks out for a virtuous man, in order to aſſociate with him, and loves an honeſt man above all things, yet in his love and goodneſs he imitates God himſelf, who hates no perſon, tho' he delights in the good, and embraces them with a peculiar affection."

* Hence it is that Pythagoras has diſtinguiſhed certain degrees of love in his golden verſes, v. 4. *&c.* which are excellently interpreted by Hierocles, p. 46.

Inde parentis honos ſequitor : tum ſanguinis ordo :
Poſt alii ſunto, virtus ut maxima, amici, &c.

Sect. CCXXI.

Our obligation to beneficence.

That degree of love, which we called above *love of beneficence* (§ 214), is of a ſublimer kind, becauſe it excites us to exert ourſelves to the utmoſt, and even with detriment to ourſelves, to promote the good of others. Now, ſince what we would deſire to be done to us by others we are obliged to do to them (§ 88), and many caſes happen in which we ourſelves would be very unhappy unleſs others ſhould liberally beſtow upon us what we want, and there is none who does not deſire that others ſhould ſo treat him ; the conſequence is, that we are obliged, in ſuch caſes, to ſupply others liberally with what they ſtand in need of, even with ſome detriment to ourſelves *.

* We are ſaid to give liberally, not what we lend, or give for hire, but what we beſtow on others, without hope of reſtitution or retribution. If I give that I may receive, ſuch an action is a kind of contract. But if I give without any deſire of, or eye to retribution or reſtitution, this is bounty or liberality. Seneca of benefits, c. 14. ſays, " I will entirely paſs thoſe whoſe good ſervices are mercenary, which, when one does, he does not conſider to whom, but for how much he is to do them, and which therefore terminate wholly in ſelf. If one ſells me corn when I cannot live without buying, I do not owe my life to him, Becauſe I bought it. I do not conſider ſo much the neceſſity of the thing to my life, as the gratuity of the deed, and in ſuch a caſe I would not have got, had I not bought ; and the merchant did not think of the ſervice it would do me, but of his own profit : what I buy I do not owe." But tho' benefits ought not to be done with ſelfiſh views, yet none does good to another, without deſiring to bind the perſon he obliges to him by mutual love ;

and therefore the receiver by receiving tacitely obliges himſelf to mutual love.

Sect. CCXXII.

What is meant by beneficent, and what by officious.

A *benefit* is a ſervice rendered to one without hope of reſtitution or retribution; and therefore readineſs to render ſuch ſervices we call *beneficence*; as readineſs to do good offices, to lay on obligation of reſtoring or compenſating by ſervices to one's ſelf is called *officiouſneſs* by Sidon. Apollin. 23. v. 478. But tho' ſuch ſervices be not properly called *benefits*; yet they ought to be highly valued, and gratefully received, if they are greater than to admit of payment, or are rendered to us by one whom the nature of the good office did not oblige to do it *.

* This likewiſe is obſerved by Seneca, c. 15. "According to this way, one may ſay he owes nothing to his phyſician but his petty fee: nor to his preceptor, becauſe he gave him money. But among us, both theſe are greatly reverenced and loved. To this it is anſwered, ſome things are of greater value than what is paid for them. Do you buy from your phyſician life and health, which are above all price; or from your inſtructor in uſeful arts and ſciences, wiſdom, and a well cultivated mind. Wherefore, to them is paid not the value of the thing, but of their labour and their attendance on us; they receive the reward, not of their merit, but of their profeſſion." Afterwards he gives another reaſon why we owe gratitude to thoſe who render us ſuch good offices, cap. 16. "What then? why do I ſtill owe ſomething to my phyſician and preceptor, after I have given them a fee; why have I not then fully acquitted my ſelf? becauſe from being my phyſician and preceptor, they become my friend: and they oblige us not by their art, which they ſell, but by their generous and friendly diſpoſition."

Sect. CCXXIII.

Beneficence ought to proceed

Since therefore beneficence is readineſs to render ſuch offices to others as we have reaſon to think will be ſerviceable to them (§ 222), every one muſt ſee that they have no title to the praiſe of beneficence, who, as the ſervant in Terence, Hecyr. 5. 4. v. 39. "do more good ignorantly and imprudently, than ever they did knowingly, and with deſign (§ 48)," or who do good with an intention to hurt; or who do good only, becauſe they think the benefit will turn more to their own advantage than to that of the receiver. From all which it is manifeſt, that in judging of benefits the mind and intention of the benefactor are more to be conſidered than the act or effect itſelf.

from inclination to be uſeful to others.

* To illuſtrate theſe concluſions by examples; none will ſay, that a perſon is benefited by one, who not knowing any thing of the matter, delivers him letters with agreeable news; or by one who praiſes him merely to get him out of his place, that he may be lord of the hall; or by one who planted trees for his own pleaſure, when he enjoys the ſhade of them, without or contrary to his intention. To ſuch caſes belongs the elegant fable in Phædrus, 1. 22. of the weaſel, who being catched by a man, when it urged him to ſpare its life, becauſe it had cleared his houſe from troubleſome mice, had this anſwer:

Faceres, ſi cauſſa mei:
Gratum eſſet, & dediſſem veniam ſupplici:
Nunc quia laboras, ut fruaris reliquiis,
Quæ ſint roſuri, ſimul & ipſos devores,
Noli imputare vanum beneficium mihi.

For this fable, according to the interpretation of Phædrus himſelf, ought to be applied to them who ſerve their own ends, and then make a vain boaſt to the unthinking of their merit.

Sect. CCXXIV.

Since benefits flow from love, which is always joined with prudence (§ 83), it is plain that whatever is not agreeable to reaſon is profuſion, and any thing rather than liberality: nor are thoſe offices deſerving of the name of benefits, which proceed from ambition and vain-glory, more than from love, and are beſtowed upon the more opulent, and not the indi-

Benefits ought to be diſpenſed with prudence.

gent *; upon unworthy perſons preferably to men of merit; or, in fine, which are done contrary to that natural order founded in natural kindred and relation, of which above (§ 220).

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* For beſides, that ſuch benefits are ſnatched from the indigent, they are likewiſe not unfrequently baits to catch; and for that reaſon likewiſe they do not merit to be called benefits, Mat. v. 46, 47. Luke vi. 32. Beſides, as to the more opulent, whatever benefit is rendered to them is neither grateful, nor has it the nature of a benefit. Thus we know Alexander the Great mocked at the pretended favour, when the Corinthians offered him the right of citizenſhip, tho' they boaſted of having never made the compliment to any but Hercules and Alexander. Seneca of benefits, 1. 13. But the memory of benefits formerly received from one yea: the cuſtoms of the ſtate in which we live, and other reaſons, may excuſe ſuch benefits: and therefore, at Rome none could blame this liberality of clients, becauſe the right of patronage there eſtabliſhed, required ſuch liberality from the clients to their patrons, Dionyſ. Halic. 2. p. 84. Plutarch. Romul. p. 24. Polyb. Hiſt. 6. p. 459. Nor were the Perſians blameable for bringing gifts to their king, ſince there was a law, " That every one ſhould make preſents to the king of Perſia according to his ability." Ælian. var. hiſt. 1. 31.

Sect. CCXXV.

Benefits ought to be proportioned to the neceſſity and condition of perſons.

Beſides, becauſe benefits ought to be advantageous to perſons (§ 222), it is evident from hence, that benefits ought to be ſuited to every one's condition and neceſſities; and therefore that thoſe are not benefits which do no good to a perſon; much leſs ſuch as do him great hurt, or at leaſt are attended with conſiderable inconvenience to him *.

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* He is not beneficent who gives a hungry perſon a jewel, to a thirſty perſon a fine garment, to a ſick perſon a feaſt. *Beſſus* did not ſurely deſerve to be called a benefactor, who put chains of gold upon *Darius*, Curt. l. 5. cap. 12. Finally, that Roman, who being ſaved from proſcription was carried about for a ſhew in a ludicrous manner, had reaſon thus to reproach his benefactor, and to ſay, " He

owed him no obligation for ſaving him, to make game and a ſhow of him." Seneca of benefits, 2. 11.

Sect. CCXXVI.

The degrees of kindred and connexion are to be conſidered.

Since that love of humanity and beneficence which binds to render good offices, extends even to enemies *(§ 219)*, it is clear that thoſe have a much better title to our love, who have done us all the kindneſſes they had in their power; and that they are the worſt of men, nay, more hard-hearted than the moſt ſavage brutes, who are not won to love by favours: they are ſo much the more unjuſt that it cannot be denied, that by accepting favours, we bind ourſelves to mutual love (§ 221).

Sect. CCXXVII.

The obligation to gratitude.

Love to benefactors is called *a grateful mind* or *gratitude*; wherefore, ſeeing one is obliged to love him from whom he hath received favours, the conſequence is, that every one is obliged to ſhew gratude in every reſpect: yet this duty is imperfect, and therefore one cannot be compelled to perform it; an ungrateful perſon cannot be ſued for his ingratitude in human courts, unleſs the laws of the ſtate have expreſly allowed ſuch an *action*. Some ſuch thing we have an example of in Xenophon's inſtitution of Cyrus, 1. 2. 7. p. 9. Edit. Oxon.

* Ingratitude is commonly diſtinguiſhed into *ſimple*, of which he is guilty who does not do good to his benefactor to his utmoſt power: and *pregnant*, of which he is guilty who injures his benefactor. The former, Pufendorff of the law of nature and nations, 3. 3. 17, ſays, a man cannot be ſued for at the civil bar; but mixed ingratitude he thinks not unworthy of civil puniſhment. But if we may ſay the truth, in this caſe the ungrateful perſon is not animadverted upon as ſuch, but as having done an injury; and he is liable to puniſhment who does an injury even to a perſon from whom he never received any favours. However, we readily grant, that an injury is much more atrocious, when it is joined with that baſeſt of vices, ingratitude,

titude. And therefore they are juſtly reckoned more wicked who are injurious to parents, inſtructors, patrons, than thoſe who only wrong ſtrangers, to whom they are under no ſpecial ties.

Sect. CCXXVIII.

The rules relating to it.

Seeing gratitude is love to a benefactor (§ 227), it follows, that one is obliged to delight in the perfection and happineſs of his benefactor; to commend and extol his beneficence by words, and to make ſuitable returns to his benefits; not always indeed the ſame, or equal, but to the utmoſt of his power; but if the ability be wanting, a grateful diſpoſition is highly laudable.

Sect. CCXXIX.

The obligation to the other.

In fine, ſince we are obliged, even to our own detriment, and without any hope of reſtitution or retribution, to do good to others (§ 221), the conſequence is, that we ought much leſs to refuſe favours to any one which he deſires with the promiſe of reſtitution or retribution; and therefore every one is obliged to render to another what we called above *officiouſneſs* (§ 222), provided this readineſs to help others be not manifeſtly detrimental to ourſelves (§ 93).

REMARKS on this Chapter.

It is not improper to ſubjoin the few following obſervations upon our Author's reaſoning in this chapter.

1. When duty is defined to be ſomething enjoined by the divine will under a ſanction, duties cannot be diſtinguiſhed into *perfect* and *imperfect* in any other ſenſe but this: "That ſome precepts of God give a right to all mankind to exact certain offices or duties from every one. But other precepts do not give any ſuch right." Thus the precept of God not to hurt any one, but to render to every one his due, gives every one a right to exact his due, and to repel injuries. But the precept to be generous and bountiful, gives no man a right to exact acts of generoſity and bounty, tho' it lays every man under an obligation to be generous and bountiful, to the utmoſt of his power. So that he who ſins againſt the former is more criminal, or is guilty of

a higher crime than he who does not act conformably to the other. This is the only ſenſe in which duties can be called, ſome *perfect*, and others *imperfect*, when duty is conſidered, with our Author, as an obligation ariſing from the divine will commanding or forbidding. For all ſuch obligation is equally perfect, equally full. The diſtinction takes its riſe from the conſideration of what crimes do, and what crimes do not admit of a civil action, conſiſtently with the good order of ſociety; and it is brought from the civil law into the law of nature. But it would, in my opinion, be liable to leſs ambiguity in treating of the law of nature, inſtead of dividing duties into thoſe of *perfect* and thoſe of *imperfect* obligation, to divide them into greater or leſſer duties, *i. e.* duties, the tranſgreſſion of which is a greater crime, and duties the omiſſion of which is a leſſer crime: or, in other words, duties the performance of which may be lawfully exacted, nay compelled; and duties the performance of which cannot be compelled or even exacted. But our Author's terms mean the ſame thing, and cannot, if his definitions be attended to, create any ambiguity. However, we may ſee from his reaſoning in this chapter, the neceſſity (as we obſerved in our preceeding remarks) of having recourſe to internal obligation (as our Author calls it) or the intrinſic goodneſs and pravity of actions, in deducing and demonſtrating human duties.

2. Since our Author's reaſoning wholly turns upon the reaſonableneſs of this maxim, "Do as you would be done by; and do not to another what you would not have done by any one to you in like circumſtances." Perhaps ſome may have expected from him demonſtration of the reaſonableneſs of this maxim. Now this truth, which is indeed as ſelf-evident as any axiom in any ſcience, as for inſtance, "That two things equal to ſome common third thing, are equal to one another:" and which therefore, it is as hard to reaſon about as it is to demonſtrate any axiom, for the very ſame reaſon, viz. that it does not in the nature of the thing require or ſtand in need of any reaſoning to prove it: This truth may however be illuſtrated ſeveral ways, in order to make one feel its evidence and reaſonableneſs. As with Puſendorff, law of nature, &c. B. 3. cap. 2. § 4. thus: "It as much implies a contradiction to determine differently in my own caſe and another's, when they are preciſely parallel, as to make contrary judgments on things really the ſame. Since then every man is well acquainted with his own nature, and as well, at leaſt, as to general inclinations, with the nature of other men, it follows, that he who concludes one way as to his own right, and another way as to the ſame right of his neighbour, is guilty of a contradiction in the plaineſt matter: an argument of a mind unſound in no ordinary degree. For no good reaſon can be given, why what I eſteem juſt for myſelf, I ſhould reckon unjuſt for another in the ſame circumſtances. Thoſe therefore are moſt properly ſociable creatures who grant the ſame privilege to others which they deſire ſhould be allowed themſelves;

and

and thoſe, on the other hand, are moſt unfit for ſociety, who imagining themſelves a degree above vulgar mortals, would have a particular commiſſion to do whatever they pleaſe." He obſerves in another place, B. 2. c. 3. § 13. "For the eaſy knowledge of what the law of nature dictates, *Hobbes himſelf commends the uſe of this rule* (De civ. c. 3. § 26). *when a man doubts whether what he is going to do to another be agreeable to the law of nature, let him ſuppoſe himſelf in the other's room.* For by this means, when ſelf-love, and the other paſſions which weighed down one ſcale, are taken thence and put into the contrary ſcale, 'tis eaſy to gueſs which way the balance will turn." He afterwards ſhews us it was a precept of Confucius, and of Ynca Manco Capace, the founder of the Peruvian empire, as well as of our Saviour. "And in anſwer to Dr Sharrock, who is of opinion (De off. ch. 2. n. 2.) "That this rule is not univerſal, becauſe if ſo, a judge muſt needs abſolve the criminals left to his ſentence, in as much as he would certainly ſpare his own life, were he in their place; and I muſt needs give a poor petitioner what ſum ſoever he deſires, becauſe I ſhould wiſh to be thus dealt with, if I was in his condition, &c." He replies, "The rule will ſtill remain unſhaken, if we obſerve, that not one ſcale only, but both are to be obſerved; or that I am not only to weigh and conſider what is agreeable to me, but likewiſe what obligation or neceſſity lies on the other perſon, and what I can demand of him without injuring either of our duties." Thus Pufendorff reaſons about this principle. But both he and our Author ſeem to conſider it not as a fundamental or primary principle of the law of nature, but rather as a Corollary of that law, which obliges us, *To hold all men equal with ourſelves.* But it cannot be ſo properly ſaid to be a Corollary from that principle, as to be the principle itſelf in other words. For what is the meaning of this rule, *To hold all men equal with ourſelves,* but to hold ourſelves obliged to treat all men as we think they are obliged to treat us? The equality of mankind means equality of obligation common to all mankind, with regard to their conduct one towards another. Now, if any one ſeeks a proof of the reaſonableneſs of holding all men equal in this ſenſe, that it is reaſonable for us to do to others what it is reaſonable for them to do, or for us to expect they ſhould do to us in like circumſtances; if any one, I ſay, ſhould ſeek a proof of this maxim, he really ſeeks a proof to ſhew, that like judgments ought to be given of like caſes, *i. e.* that like caſes are like caſes; — and if, owning the truth of the propoſition, he asks why it ought to be a rule of action, does he not ask a reaſon why a reaſonable rule ſhould be admitted as a reaſonable rule; or why reaſon is reaſon, as we had occaſion to obſerve in another remark?

3. But in the third place, that we are made for benevolence, becauſe we have benevolent affections, and our principal happineſs conſiſts in the exerciſe of the ſocial affections, or the ſocial

virtues; and our greateſt and beſt ſecurity for all outward enjoyments, and for having and poſſeſſing the love of others, is by being benevolent;—that upon theſe and many other accounts, we are made and intended for benevolence, is as evident as that a clock is made to meaſure time, and in conſequence of the ſame way of reaſoning, viz. the way we reaſon about any conſtitution, or any final cauſe. We ſee what ſad ſhifts they are reduced to, who would explain away into certain ſelfiſh ſubtle reflexions, all that has the appearance of ſocial, kindly and generous in our frame; and the perplexity and ſubtlety of ſuch philoſophy is the ſame argument againſt it, which is reckoned a very good one againſt complicated, perplexing hypotheſes in natural philoſophy, compared with more ſimple ones. (See ſome excellent obſervations on Hobbes's account of pity in Dr. Butler's excellent ſermon on compaſſion, in a marginal note.) Who feels not that we are naturally diſpoſed to benevolence, and what is the way in which our natural benevolence operates, and ſo points us to the proper exerciſes of it, while Cicero thus deſcribes it: "There is nothing, ſays he, ſo natural, and at the ſame time ſo illuſtrious, and of ſo great compaſs, as the conjunction and ſociety of men, including a mutual communication of conveniencies, and general love for mankind. This dearneſs begins immediately upon one's birth, when the child is moſt affectionately beloved by the parent; from the family, it by degrees ſteals abroad into affinities, friendſhips, neighbourhoods; then amongſt members of the ſame ſtate; and amongſt ſtates themſelves, united in intereſts and confederacies; and at length ſtretcheth itſelf to the whole human race. In the exerciſe of all theſe duties, we are farther diſpoſed to obſerve what every man hath moſt need of, and what with our help he may, what without our help he cannot attain; ſo that in ſome caſes the tye of relation muſt yield to the point of time; and ſome offices there are which we would rather pay to one relation than to another Thus you ought ſooner to help a neighbour with his harveſt, than either brother or a familiar acquaintance; but, on the other ſide, in a ſuit at law, you ought to defend your brother or your friend before your neighbour, &c." Cicero de fin. l. 5. c. 23. Who feels not that this is the language of nature; that thus our affections work; that thus nature moves, prompts and points us to work? And who can conſider this natural tendency or courſe of our affections without perceiving by his reaſon, the advantage, the uſefulneſs of this their natural tendency, with regard to ourſelves and others equally; and conſequently the fitneſs of our taking care that they ſhould always continue to operate according to this rule, according to this their natural tendency? Or who does not feel that indeed this is the true account of human happineſs, the happineſs nature intended for us, our beſt and nobleſt happineſs?

Happier as kinder! in whate'er degree,
And heighth of bliſs but heighth of charity.
Eſſay on Man, Ep. 4.

But if nature points out this courſe, this regular courſe of our affections; if it is felt to be the ſtate of mind that alone affords true happineſs; and if the general happineſs of mankind plainly requires this direction and courſe of our affections: If, in one word, nature dictates it, and reaſon muſt approve of it in every view we can take of it, in what ſenſe can it be denied to be our natural duty and the will of our Creator? And is it any wonder, that this rule of conduct hath been known to thinking men in all ages (as we cannot look into ancient authors without clearly ſeeing it hath been) ſince every heart dictates it to itſelf? This rule, "Do as you would be done by," is a rule of eaſy application, and it is univerſal, or it gives an eaſy, ready and clear ſolution in all caſes. This appears from our Author's preceding and following applications of it to caſes: for it is from it alone he reaſons throughout all his deductions of duties. And that it is an equal, juſt, or reaſonable rule, cannot be denied without aſſerting this abſurdity, That what is true and juſt in one caſe, is not always and univerſally true and juſt in all ſimilar caſes. Again, that we are made to love mankind, and to live in the exerciſe of love and benevolence, is plain from our make and frame, and the intention of our Maker thereby diſcovered to us, according to all the received rules of reaſoning about final cauſes. And therefore the principles upon which our Author builds, are in every view of them beyond all diſpute. He now proceeds to enquiries of a more complex nature; but he ſtill continues to argue from the ſame ſelf-evident truths.

CHAP. IX.

Concerning our hypothetical duties towards others, and the original acquiſition of dominion or property.

Sect. CCXXX.

The connection.

WHat hath hitherto been explained, belongs partly to the *love of juſtice*, and partly to that which we call the *love of humanity and beneficence* (§ 84). From the latter we have deduced our imperfect duties in the preceding chapter; from the former our perfect ones are clearly deducible, which we ſaid, conſiſt in not injuring any perſon (and this we call an *abſolute duty*), and in rendering to every one his due (which we call an *hypothetical duty.)* Now, having treated of *abſolute duty* in the ſeventh chapter, we are now to conſider our *hypothetical duties* with the ſame care and accuracy.

Sect. CCXXXI.

What is meant by our own, by dominion, by poſſeſſion, by property, by communi-ty.

That is properly called one's *own* which is in his *dominion*. By *dominion* we mean the right or faculty of excluding all others from the uſe of a thing*. The actual detenſion of a thing, by which we exclude others from the uſe of it, is called *poſſeſſion*. Again, we claim a right to ourſelves either of excluding all others from the uſe of a thing, or of excluding all others, a few only excepted. In the former caſe, the thing is ſaid to be in *property*; in the other caſe, it is ſaid to be in *poſitive communion*, which is either *equal*, when all have an equal right to the common thing; or *unequal*, when one has more, or a greater right than another to that thing. And it again is either *perfect*, when every one has a perfect right to the common thing, or *imperfect*, when none hath a perfect right to it, as in the caſe of the ſoldiers of an army, to whom a certain reward in money is appointed by the prince. But if neither one, nor many have right or deſign to exclude from a thing not yet taken poſſeſſion of, that thing is ſaid to be in *negative communion*; and this communion alone is oppoſite to dominion, becauſe in that caſe the thing is yet under the dominion of no perſon.

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* That dominion conſiſts ſolely in the faculty of excluding others from the uſe of a thing, is obvious. For all the other effects of dominion, which are uſually enumerated in the definition of it, may be ſeparated from it, and yet one may remain maſter or owner of it, or have it in his dominion. Thus, e. g. we may obſerve, that the right or faculty of receiving all the profits of a thing by uſufruct, is ſeparated from propriety, while the dominion remains

entire: and it is known, that the faculty of diſpoſing of a thing does not belong to minors, whom none however will deny to have dominion. Whence Seneca of benefits, 7. 12. ſays, “ It is not a proof that a thing is not yours, that you cannot ſell it, waſte it, &c. For even that is yours, which is yours under certain limitations and conditions.” In fine, we find the faculty taken away in certain countries from the owner, of vindicating to himſelf from a third poſſeſſor, a thing lent or depoſited, where the law takes place, *Hand muſs hand wahren.* Since therefore that only ought to enter into the definition of a thing, which ſo belongs to its eſſence that it cannot be abſent, but the faculty of excluding others from the uſe of a thing being taken away, one immediately ceaſes to have any dominion, it cannot be doubted but this alone completes the definition of dominion. And this I take to be Arrian’s definition, when he ſays, one who hath dominion is, “ *τὸν τῶν ὑπ᾽ ἄλλων σπȣδαζομένων ἢ ἐκκλινομένων ἔχοντα ἐξȣσίαν*, He who hath thoſe things which others deſire or fly from in his power.”

Sect. CCXXXII.

The right of man to created things.

Now ſince reaſon plainly diſcovers that men were created by God (127), it is manifeſt that our Creator muſt will that we exiſt. But he who wills the end, muſt be judged to will the means likewiſe. And therefore God muſt have willed that men ſhould enjoy all things neceſſary to the preſervation of their being which this earth produces. Further, God having given evident ſigns of his particular love to man, by having made him a moſt excellent creature, it cannot be doubted that he deſires and delights in our perfection and happineſs (§ 80). And by conſequence he muſt will that we ſhould enjoy even all things which can conduce to render our life more perfect, more ſatisfactory, more happy, provided we do not abuſe them * *(§ 90).*

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* It hath been called into queſtion by ſome, whether man hath a right to the uſe of the brutes for the preſervation of his life, which cannot be killed without their feeling pain? nay ſome have denied it, becauſe they thought

it an injury to the brutes, and not uſe but abuſe of them, to kill them in order to feed upon them, eſpecially ſince men may ſuſtain their lives without ſuch bloody revelling. Others add, that eating fleſh is not wholſome, and renders men cruel and ſavage. This argument was firſt urged, we know, by Pythagoras, and afterwarrds by Porphyry in his books *περὶ ἀποχῆς*. See Scheffer de Philoſoph. Italica, cap. 14. But in the firſt place, this whole hypotheſis about injury done to brutes, is founded on another erroneous opinion of the tranſmigration of ſouls, or of their having ſouls in common with us, and therefore a common right with us (*κοινῷ δικαίῳ ψυχῆς*) as it is called by Pythagoras in Diogenes Laertius, 8. 13. in explaining which Empidocles ſays in the ſame author,

Nam, memini, fueram quondam puer, atque puella,
Plantaque, & ignitus piſcis, pernixque volucris.

Add. Iamblichus's life of Pythagoras, 24. 108. and Porphyry's life of Pythagoras, p. 188. But it is falſe that there is any communion of right between us and the brutes (§ 90). And hence it is falſe, that an injury is done to the brutes. We are not therefore to abſtain from things becauſe we can be without them; for God not only wills that we exiſt, but that we live agreeably; and that uſe is not abuſe, which is not contrary to the will of God. In fine, that unwholeſomeneſs which they alledge, is not ſufficiently proved, and moſt probably, it ariſes not from the moderate eating of fleſh, but gluttony, and the abuſe of created things, which we alſo condemn.

Sect. CCXXXIII.

Originally all things were in a ſtate of negative communion.

Since God then hath given to man for his uſe and enjoyment all things conducive to render his life agreeable (§ 232), he undoubtedly wills that none ſhould be excluded from any uſe of theſe things; and therefore, according to the intention of God in the beginning of things, all things were in a ſtate of negative communion, and ſo were in the dominion of none * (§ 231).

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* And thus not only the ſacred records, Geneſis i. 28, 29. but even the ancient poets deſcribe the primæval ſtate of mankind, which they have celebrated under the name

of the golden age; for then, as Virgil ſays, Georg. I. v. 125.

> *Nulli ſubigebant arva coloni,*
> *Nec ſignare quidem, aut partiri limite campum*
> *Fas erat: in medium quærebant: ipſaque tellus*
> *Omnia liberius, nullo poſcente, ferebat.*

They deny then, that there was at that time any diviſions of land into different properties marked by boundaries, but aſſert that all things were in common, and ſo left to the uſe of all mankind, that none could be excluded from the uſe of them.

Sect. CCXXXIV.

But it was lawful to depart from this ſtate, neceſſity ſo urging.

Whatever God willed, he willed for the moſt wiſe reaſons, and therefore it ought not to be altered by men but in caſe of great neceſſity. But ſince all the divine affirmative laws, ſuch as this is, "That all things ſhould be in common for the common uſe of all mankind," admit of exception in caſe of neceſſity (§ 159); and by neceſſity here is to be underſtood not only extreme neceſſity, but even ſuch as makes it impoſſible to live conveniently and agreeably (§ 158 & 232); the conſequence is, that men might, neceſſity ſo urging them, lawfully depart from that negative communion, and introduce dominion, which is oppoſite (§ 231) to negative communion.

Sect. CCXXXV.

What neceſſity urged men to introduce dominion.

Now it is very evident, that if mankind had been confined to a ſmall number, there would have been no need of any change with regard to the primeval negative community of things, becauſe the fertility of nature would have ſufficed to render the lives of all, if not agreeable, at leaſt commodious or tolerable. But ſo ſoon as mankind was ſpread over the whole earth, and diſperſed into innumerable families, ſome things began not to be ſufficient to the uſes of all, whereas other things continuing to be, becauſe of their vaſt plenty, ſufficient for all; neceſſity itſelf obliged men to introduce dominion with regard to the things which were not ſufficient for the uſes of all (§ 234), leaving thoſe things only in their original negative community which are of inexhauſtible uſe, or which are not requiſite to the preſervation and agreeableneſs of life *.

* And hence the lawyers have pronounced ſuch things common by the law of nature, §. 1. Inſt. de rerum diviſ. and that not, " as thoſe public things which are the patrimony of a whole people, but as for thoſe things which are originally a preſent of nature, and have never paſſed into the dominion of any perſon," as Neratius ſays, l. 14. pr. D. de adqu. rerum dom. The beſt and moſt beautiful of things, on account of their abundance, have always remained in the primeval negative communion. Hence Petronius Satyr. c. 6. ſays, " What is common, that is in its nature moſt excellent? The ſun ſhines to all; the moon, attended with numberleſs ſtars, even guides the wild beaſts to their food. What is more beautiful than water? and it is for common uſe." Neither does any one affect dominion over flies, mice, worms, and other things, which are either hurtful, or of no benefit to mankind.

Sect. CCXXXVI.

This inſtitution is not unjuſt.

Dominion therefore was introduced, and negative community was aboliſhed by neceſſity itſelf. But that this inſtitution of mankind is injurious to none is manifeſt, becauſe in negative communion none has a right to exclude another from the uſe of things (§ 231); and therefore it muſt be lawful to any one ſo to appropriate to himſelf any thing belonging to none, that he could not afterwards be forced by any perſon to yield him the uſe of it, but might detain it to himſelf, and ſet it aſide for his own uſe *.

* For what none hath a right or intention to exclude me from the uſe of, that belongs to none. But a thing

ceaſes to be none's, ſo ſoon as I apply it to my uſes, and I have reſolved to make uſe of my right granted to me by God (§ 232); becauſe ſince he hurts and injures me, who endeavours to render me more imperfect or unhappy, (§ 178), he certainly injures me, who endeavours to deprive me of what I have taken to myſelf for the ſake of my preſervation, and living agreeably. The ſame happens in this caſe, that Arrian. diſſert. Epict. 2. 4. ſays of the theatre, tho' it be poſitively common. "Is not the theatre common to all the citizens? But if one takes a place in it, turn him out of it if you can." And Seneca of benefits, 7. 12. "I have truly a place among the Equeſtrian order; but when I come into the theatre, if theſe places be full, I have a right to a place there, becauſe I may ſit there; and I have no right to a place there, becauſe all the places are poſſeſſed by thoſe with whom I have my right in common.

Sect. CCXXXVII.

After that things are either poſitively common or in property.

When men, obliged by neceſſity to it, have introduced dominion (§ 235), this muſt conſiſt either in poſitive communion, or in property (§ 231). Wherefore, from the moment men depart from negative communion, all things are either poſitively common to many, or they begin to be proper to particulars; and community ariſes from the reſolution of many to poſſeſs the ſame thing undivided in common, and to exclude all others from the uſe of it *. But property takes its riſe either from immediate occupancy and poſſeſſion at firſt of a thing belonging to none, or from an after-deed, in conſequence of a diviſion or ceſſion of things poſitively common.

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* This, no doubt, was done at firſt immediately, when families and tribes began to ſeparate and diſperſe into different parts of the world. For then each family took poſſeſſion of ſome region for itſelf in common, and without diviſion for a while, till neceſſity urging, they divided the common poſſeſſion, or by compact gave the liberty to each particular of occupying as much as he wanted. The antients mention ſeveral nations which in the beginning

poſſeſſed whole provinces in common without diviſion, as the Aborigenes in Juſtin, 43. the Scythians and Getar. in Horace, Carm. 3. 4. the Germans in Tacitus, c. 26. the inhabitants of the iſland Lipara, the Panchæans and Vaccæans, Diodorus Siculus, Biblioth. v. 9 & 45.

Sect. CCXXXVIII.

Why it was neceſſary to depart from poſitive community.

Truly, if ſuch were the happineſs of mankind, that all were equally virtuous, we would neither ſtand in need of dominion, nor of any compacts, becauſe even thoſe who had nothing in poſſeſſion, would want nothing neceſſary to their comfortable ſubſiſtence. For in that caſe every man would love another as himſelf, and would cheerfully render to every one whatever he could reaſonably deſire to be done by others to him. And what uſe would there be for dominion among ſuch friends having all in common? But ſince, in the preſent ſtate of mankind, it cannot be expected that any multitude of men ſhould be all ſuch lovers of virtue, as to ſtudy the happineſs of others as much as their own; hence it is evident, that poſitive communion is not ſuitable to the condition of mankind, as they now are, and therefore that they had very good and juſtifiable reaſons for departing from it likewiſe *.

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* Whoever mentions the being of ſuch a communion any where among mankind, repreſents at the ſame time theſe men as extremely virtuous. This there is reaſon to ſay of the church of Jeruſalem, Acts iv. 32. Nor did the poets think what they ſay of the community among mankind in the golden age could have been credited, if they had not alſo repreſented them as moſt ſtudious of virtue; who, as Ovid ſays, Metam. 1. v. 90.

vindice nullo,
Sponte ſua, ſine lege, fidem rectumque colebant.

The Scythians beyond the Mæotis, among whom Scymnus Chius tells us this community obtained, are ſaid by him to have been τοὺς σφόδρα, ἐυσεβεστάτους, a moſt pious race. Iamblichus in his life of Pythagoras, § 167, tells us, that Pythagoras derived his community of things from juſtice as its ſource: But virtue, juſtice and piety becoming rare and languid amongſt men, that this communion could not take place or ſubſiſt, is manifeſt.

Sect. CCXXXIX.

What are the original ways of acquiring dominion or property?

And hence alſo it is conſpicuous how property was introduced, and what are the ways of acquiring property in a thing: For a thing is either ſtill without dominion, or it is in the dominion of ſome perſon or perſons. Now, in the former caſe we call the *original* ways of acquiring property with Grotius, thoſe by which we acquire either the very ſubſtance of a thing yet belonging to none, or the accretions which may any how be added or accede to it. The firſt of which is called *occupancy*; the latter *acceſſion*.

Sect. CCXL.

What are the derivative ways?

But if a thing be already in any one's dominion, then it is either in the property of many, or of a particular (§ 231). In the firſt caſe, things in common are appropriated by *diviſion* or *ceſſion*; in the latter by *tradition*. Nor is there any other *derivative* way of acquiring dominion, which may not be moſt conveniently reduced to one or other of theſe ſorts.

Sect. CCXLI.

What occupancy is, and what a thing belonging to none?

Occupancy is taking poſſeſſion of a thing belonging to none. A thing is ſaid to belong to *none*, which none ever had a right to exclude others from the uſe of, or when the right of none to exclude others from it, is evidently certain, or when the right of excluding others from the uſe of it is abdicated by the poſſeſſor himſelf freely; in which laſt caſe, a thing is held *for derelinquiſhed*. But ſeeing none has a right to exclude others from the uſe of things which belong to none (§ 231), the conſequence is, that things belonging to none, fall to the ſhare and right of the firſt occupants. Nor can this be underſtood to extend to things that are loſt, carried off by fraud or force, caſt over board in imminent danger of ſhipwreck, or taken away by brute animals; for in no ſenſe are ſuch things belonging to none, ſince they had owners, and theſe owners never abdicated their right and dominion *.

* Therefore the fiſher Gripus philoſophizes very ſoundly in Plautus, Rud. 4. 3. v. 32. concerning the fiſh he himſelf had caught in the ſea, when he pleads they were his own, becauſe none could juſtly exclude him from the uſe of them:

Ecquem eſſe dices mari piſcem meum?
Quos quum capio, ſiquidem cepi, mei ſunt: habeo pro meis:
Nec manu adſeruntur, neque illic partem quiſquam poſtulat.
In foro palam omnes vendo pro meis venalibus.

But he gives a very bad reaſon, when he claims to himſelf a purſe, which being loſt by ſhipwreck, he had brought out of the ſea in his net:

In manu non eſt mea,
Ubi demiſi rete atque hamum, quidquid hæſit, extraho.
Meum, quod rete atque hami nacti ſunt, meum potiſſimum eſt.

For to this Trachalio anſwers very right, v. 42.

Quid ais, impudens,
Auſus etiam, comparare vidulum cum piſcibus?
Eadem tandem res videtur?

Sect. CCXLII.

Occupancy is made by mind and body at once.

Occupancy being taking poſſeſſion of a thing belonging to none (§ 241), and poſſeſſion being detention of a thing, from the uſe of which we have determined to exclude others (§ 231), it is plain that occupancy is made by mind and body at once, and that intention alone is not ſufficient to occupancy, if another has a mind to uſe his right; nor mere taking poſſeſſion of a thing, without intention to exclude others from the uſe of it; but by the tacite conſent of mankind the declaration of intention

intention to appropriate a thing to one's ſelf, joined with certain ſenſible ſigns, is held for occupancy *.

* Thus one is reckoned to have taken poſſeſſion of a field, tho' he hath not walked round every ſpot of it, l. 3. § 1. l. 48. D. & l. 2. C. de adqu. vel amitt. poſſeſſ. if he hath teſtified by ſome ſign, ſuch as cutting a branch from the tree, *&c.* to thoſe preſent, his intention of appropriating that field to himſelf. But ſince theſe ſigns have their effect by tacite convention, they are not arbitrary; and therefore, he who threw his ſpear into a city deſerted by its inhabitants, ſeems no more to be the occupant of that city than a hunter is of a wild beaſt, which, having flung his ſpear at it, he neither kills nor wounds. And hence may be decided the famous controverſy between the people of Andros and Chalcis, about their right of occupancy with reſpect to the city of Acanthos, the former pleading that their ſpy ſeeing himſelf outrun by the Chalchidian ſpy, threw the ſpear which he had in his hand at the city gate, which ſtuck there; the other denying that cities could be occupied in this manner by throwing ſpears, and aſſerting their right to the city, becauſe their ſpy had firſt entred into it. The ſtory is related by Plutarch, Quæſt. Græc. 30.

Sect. CCXLIII.

And either in the lump, or by parts.

Moreover, ſince every thing may be occupied which is none's poſſeſſion (§ 241), it will therefore be the ſame thing whether whole tracts of land unpoſſeſſed be occupied by many in lump, or whether particular parts be occupied by particular perſons. The former, Grotius of the rights of war and peace, calls occupying *per univerſitatem*, by the whole; and the latter, occupying by parcels, *(per fundos)*. But becauſe he who takes poſſeſſion of the whole, is judged to take poſſeſſion of every part, hence it follows, that when any number of men, as a people in an united body, ſeize on ſome deſolate tract of land by the whole, nothing becomes proper to any particular perſon, but all contained in that region, if particular parts be not taken poſſeſſion of by particulars, belongs to the whole body, or to their ſovereign *.

* Hence, in a tract of land, particulars may appropriate each to himſelf a particular part, and yet the whole territory may belong to the people, or the united body. Dio Chryſoſtom in Rhodiaca 31. "The territory is the ſtate's, yet every poſſeſſor is maſter of his own portion."

Sect. CCXLIV.

Whether wild beaſts, fiſhes, birds, be things belonging to none.

None therefore can deny that *hunting*, *fiſhing*, *fowling*, are ſpecies of occupancy, not only in deſart places unpoſſeſſed, but likewiſe in territories already occupied, ſince ſuch is the abundance of wild beaſts, fiſh, and winged creatures, that there is enough of them for all men *(§ 235)*; yet, if there be any good or juſt reaſon * for it, a people may, without injury, claim to themſelves all ſuch animals as are not under dominion (§243) or aſſign them to their ſovereign as his *ſpecial right*; and that being done, it becomes contrary to the law of juſtice for any one raſhly to arrogate to himſelf the right of hunting already acquired by another.

* Many ſuch reaſons, tho' not very proper ones, are accumulated by Puſendorff, of the law of nature, *&c.* 4. 6. 6. The one of greateſt moment is, that wild beaſts, fiſh and fowls, are not every where in ſuch exhauſtleſs abundance that the deſtruction of the whole ſpecies may not be feared, if the right of hunting be promiſcuouſly given to all (§ 235), whence we may ſee why men are nowhere forbid to hunt and kill ſavage beaſts, which are hurtful to mankind; nay, in ſome countries, rewards are offered to thoſe who can, by bringing their heads, skins, or talons to the magiſtrate, prove he hath cleared the province from ſuch peſts.

Sect. CCXLV.

What animals may be hunted.

But wherever the right of hunting is promiſcuous, reaſon plainly teaches that this right does not extend to tame animals, becauſe they are in domi-

nion,

nion, nor to creatures tamed by the care of men, while one poſſeſſes them, or purſues them with an intention to recover them, or hath not by clear ſigns manifeſted his deſign to relinquiſh them * : nay, that it does not extend to wild beaſts incloſed in a park, to a fiſh-pond, a warren, a bee-hive, &c. but to thoſe which, as *Caius* elegantly expreſſes it, l. 1. §. 1. de adqu. dom. *Terra*, *mari*, *cœlo capiuntur*, are caught in the ſea, air, or land.

* Thus he will hardly be excuſable, by a pretended right of hunting, who ſeizes a ſtag with bells about his neck, tho' wandering, if his owner be known: Nor is he to be defended, who keeps the maſter of a bee-hive, who is purſuing his bees, out of his court, that he may take poſſeſſion of them himſelf; tho' that ſeemed not unjuſt to the Roman lawyers, § 14. Inſt. de rerum diviſione. For tho' a maſter have the right to exclude others from the uſe of his own, yet he who enters our houſe to recover his own, does not uſe ours, but reclaims his own. And how can it be more juſt to keep a perſon out of our court who is purſuing his bees, than to drive a neighbour away from our houſe who comes to reclaim his hens which had flown into our court? Wherefore that law of Plato was much more equal, de legibus, l. 8. " If any perſon follows his bees, and another by moving the air invites them into his ground, let him repair the damage."

Sect. CCXLVI.

When animals fall to the ſhare of thoſe who take them.

Moreover, ſince beſides the intention of excluding others from the uſe of a thing, corporal poſſeſſion is required to occupancy (§ 242); the conſequence is, that it is not enough to wound a wild beaſt, much leſs is it ſufficient to have a mind to ſeize one that ſhall fall by its wound; but it is requiſite either that it be taken alive or dead by the hunters dogs, nets, or other inſtruments; for if neither of theſe be done, any one has a right to ſeize and kill a creature, tho' wounded by another, becauſe it is not yet made property *.

* But there hath always been a great diverſity of opinions about this matter; and hence it is, that the laws of countries are ſo different about it. See the different judgments of Trebatius and other Roman lawyers on this head, l. 5. D. de adqu. rerum dom. The Salic law, tit. 35. § 4. does not permit a wild beaſt that was ſo much as but raiſed by another's dogs to be intercepted by any one. The Langobard law, l. 1. tit. 22. § 4. & 6. adjudges to the ſeizer the ſhoulder with ſeven ribs, and the reſt to the wounder. Theſe, and other ſuch like laws among the ancients are collected by Pufendorff of the law, *&c.* 4. 6. 10.

Sect. CCXLVII.

Whether occupancy by war be of this kind?

Another ſpecies of occupancy is called *occupancy by war*, by which it is aſſerted, that perſons, as well as things, taken in lawful war, become the taker's by the law of nations, l. 1. §. 1. D. de adqu. vel amitt. poſſ. But becauſe occupancy can only take place in things poſſeſſed by none (§ 241), and things belonging to an enemy can only be by fiction *, and free perſons cannot ſo much as by fiction be deemed to belong to none; it follows, that occupancy by war does not belong neither to the original ways of acquiring, nor to occupancy, but muſt be derived from another ſource, even from the right of war itſelf.

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* Pufendorff, of the law of nature, *&c.* 4. 6. 14. thus explains this fiction: "By a ſtate of war, as all other peaceful rights are interrupted, ſo dominion thus far loſes its effect with regard to the adverſe party, as that we are no longer under obligation to abſtain from their poſſeſſions, than the rules of humanity and mercy adviſe us. In war, therefore, the goods of one party, in reſpect of the other, are rendered, as it were, void of dominion. Not that men do by the right of war ceaſe to be proprietors of what was before their own; but becauſe their propriety is no bar againſt the enemy's claim, who may ſeize and carry away all for his own uſe." But when things are rendered void of dominion, none has a right to exclude others from the uſe of them (§ 231); now, an enemy always preſerves his right

of excluding an enemy from the uſe of his things ; nor does he any injury to any one, while he fights for his own with all his might. Who then will call ſuch things, things void of dominion ? which if it be ſo, an enemy does not loſe the things taken by his adverſe party, becauſe he has not the right of excluding an enemy, but for want of ſufficient force to repel his enemy.

Sect. CCXLVIII.

Of finding.

To occupancy *finding* is properly referred, ſince it conſiſts in taking hold of a thing belonging to none ; and there is no doubt that a thing not yet poſſeſſed, or left by its poſſeſſor, falls to the finder, who firſt ſeizes it with an intention of making it his own ; wherefore the law of the Stagiritæ, Biblienſes and Athenians, is contrary to the law of nature : "ἃ μὴ ἔθου, μὴ ἀνέλῃ." "What you did not place, do not take up," unleſs it be only underſtood of things loſt ; Ælian. Hiſt. Var. 3. 45. 4. 1. Diog. Laert. 1. 57. Nor do they leſs err, who adjudge a thing found in common to the finder, and him who ſaw it taken up *. But this right ought not to be extended to things which a people poſſeſs themſelves of by the right of occupancy made by an united body in whole, or hath ceded to their ſovereign as a ſpecial privilege, which may be lawfully done, as we have already obſerved (§ 243).

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* It was an ancient cuſtom to demand in common what was found, and it was done by a *formula* called, *in commune*, or among the Greeks κοινὸς Ἑρμῆς, or κοινὸν τοῦ Ἑρμῆ, of which *formula* ſee Eraſmus in adagiis : Many things are noted with relation to it by the learned upon Phædrus Fab. 5. 6. v. 3. See likewiſe Plautus Rudent. 4. 3. v. 72. But ſince things in the poſſeſſion of none fall to the moſt early occupant (§ 241), and none has a right to exclude another from the uſe of ſuch things (§ 231) ; and he, in fine, who only ſeized a thing with his eyes, but does not take hold of it, cannot be ſaid to occupy (§ 242), it is evident that ſuch a one has no right to demand any ſhare of what is found, unleſs the civil laws of a country or cuſtom permits it.

Sect. CCXLIX.

Nor is it leſs manifeſt that things belong to the finder which are abandoned by one of a ſound mind, and maſter of his actions, with intention to abdicate them; and therefore ſcattered gifts, nay, even treaſures, whoſe former owners cannot be certainly known, which are found by accident, unleſs the people or their ſovereign claim them to themſelves (§ 243). About which matter various laws of nations are quoted by Grotius of the rights of war and peace, 2. 8. 7. Pufendorff 6. 13. and Hertius in his notes upon theſe ſections; Ev. Otto upon the inſtitutes, § 29. inſt. de rer. diviſ. Yet regard ought to be had to the proprietor of the ground, as having a right to all the profits of it of every ſort*. And therefore the emperor Hadrian, juſtly, and conformably to the laws of natural equity, adjudged one half of a thing found to the finder, and the other to the proprietor of the ground where it was found. Spartian in Hadriano, c. 18. §. 39. inſt. de rerum diviſione.

And things abandoned, as treaſures.

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* This is ſo true, that ſome nations thought the finder was to be preferred, as the Hebrews, Mat. xiii. 44. Selden de jure nat. & gent. See Hebr. vi. 4. the Syrians, the Greeks, and not a few among the Romans. (See Philoſtrat. vita Apoll. Tyan. 2. 39. de vita Sophiſt. 2. 2. Plautus Trinum. 1. 2. v. 141. l. 67. Dig. de rei vind. Where a part is granted to the finder, there ſeems to be no diſtinction between one hired to dig our ground, and one not hired. For tho' hired workers acquire to us by their hired labour, yet that does not ſeem a juſt reaſon for a diſtinction, if one hires himſelf not to ſearch for treaſures, but to dig a pit, or for any other like work. See Corn. van Bynkerſh. obſerv. 2. 4.

Sect. CCL.

Another original way of acquiring dominion is *acceſſion*, by which is underſtood the right of claiming to ourſelves whatever additions are made to a

What acceſſion is.

ſubſtance belonging to us. Now, ſince ſubſtances belonging to us may be augmented either by natural growth, by our own induſtry, or by both conjointly; *Acceſſion* is divided by the more accurate doctors of the law into *natural*, *induſtrious*, and *mixed* *.

* Thus to nature we owe the breed of animals, increments by rivers, a new caſt up iſland, a forſaken channel: To our own induſtry, a new form, any thing added to what belongs to us, mixed or interwoven with it, joined or faſtened to it, by lead or iron, or any other way; writing upon our paper, painting upon our cloath or board, &c. And partly to nature, and partly to induſtry, the fruits of harveſt, theſe being owing conjointly to the goodneſs of the ſoil, and the clemency and favourableneſs of the weather, and to our own skill and labour. And therefore the firſt ſort are called *natural* increments, the ſecond *induſtrious* acquirements, and the third *mixed*. For what others add under the title of *fortuitous*, is more properly referred to the occupancy of things belonging to none.

Sect. CCLI.

The foundation of natural acceſſion.

As to *natural* acceſſion, what belongs to us either receives an addition we cannot certainly diſcover the origine and former owner of, or an addition by ſomething known to belong to another. In the firſt caſe, ſince a thing, whoſe maſter cannot be certainly known, belongs to none (§ 241), there is no reaſon why ſuch an increment may not go with the thing to which it hath acceded, and ſo be acquired to us. But in the other caſe, the thing hath an owner, who can by right exclude others from the uſe of it (§ 231); and therefore I have no more reaſon to think ſuch a thing, however it be added to my goods, is acquired to me, than when a ſtrong wind blows the linen of Titius, that were hung out in his garden, into my court *.

* No reaſon can be imagined why an owner, who is well known to be ſuch, ſhould loſe the property of any

thing belonging to him while it ſubſiſts, if he hath neither abdicated his property, nor transferred it to another by any deed: And it would be cruel to take advantage of one's misfortune or calamity to deprive him of his right. If then one continues proprietor or maſter of a thing, which is added by whatſoever chance to our goods, he hath ſtill the right of excluding any other from the uſe of that thing (§ 231); and therefore the dominion of it cannot be acquired againſt his will.

Sect. CCLII.

Of the breed of animals in particular.

From the foregoing moſt evident principles, (§ 251), we may alſo conclude, that *offspring*, or a *birth*, the origine of which is not evident, (which often happens with regard to animals, and likewiſe to perſons born out of lawful marriage) follows the dam or mother as an acceſſory increment, and that Ulpian, l. 24. D. de ſtatu hominum, not without reaſon aſcribes this effect to the law of nature. But this does not appear equal if both parents be certainly known *, unleſs the male be kept at common expence for procreation, as a bull often is in common to many, or when the owner lets his bull or ſtallion to his neighbours for a certain hire.

* Hence with regard to ſlaves, a diviſion of children commonly takes place; ſo that the firſt belongs to the mother's owner, and the next to the father's, and thus the offspring is ſhared by turns between the two maſters. Of this I have diſcourſed in my Element. jur. Germ. 1. 1. 30. where I have quoted examples of it among the Wiſigoths and others, *&c.* From Goldaſt. rerum Alam. Tom. 2. charta 2. & Aventin. Annal. Boic. l. 7. 14, 23. p. 708.

Sect. CCLIII.

Of new iſlands, whether caſt up, or artificial.

Nor is it leſs difficult to determine to whom a new *iſland*, that ſtarts up in the ſea, or in a river, belongs. For ſince it is impoſſible to diſcover with certainty to whom the different particles of earth belonged which have coalited into an iſland (§ 251), it follows, that an iſland muſt be adjudged an acceſſion to the ſea or river *; and therefore, if the ſea or river belong to no perſon, the iſland likewiſe is without an owner, and muſt fall to the firſt occupant. But if, as often happens, either the ſea or river belongs to a people or their ſovereign (§ 243), that people or ſovereign will have a juſt title to the iſland. In fine, ſince a thing which appertains to a known maſter, cannot be acquired by any perſon by acceſſion (§ 251), an owner cannot loſe his ground which is waſhed by a river or channel into a new iſland, as the Roman lawyers have acknowledged, l. 7. §. 4. l. 30. §. 2. D. de adqu. rer. dom.

* There is therefore no reaſon why a new iſland ſhould accede to the neighbouring fields upon each ſide, if it is formed in the middle, or to the one of them to which it is neareſt; which however ſeveral lawyers have aſſerted, § 22. Inſt. de rer. div. l. 7. § 3. l. 29. l. 30. § 1. D. de adqu. rer. dom. For the particles of earth forming the iſland come from grounds in a way that it cannot be certainly determined from what poſſeſſors they were carried off, and it is more probable that they were waſhed from more remote than from nearer fields. Beſides, the river itſelf ſometimes ſweeps along with it, particles waſhed from the bottom, which at laſt collecting, form an iſland, according to Seneca, nat. quæſt. 4. 9. This however was the opinion of Caſſius Longinus, which his followers afterwards defended as by league and compact. Aggen Urbic. de limit. agr. p. 57. But the Proculiani, whoſe leader was Labeo, have exploded it in their way, Labeo apud Paullum, l. 65. § 4. D. de adqu. dom. "Si id quod in publico innatum aut ædificatum eſt, publicum eſt: inſula quoque, quæ in flumine publico nata eſt, publica eſſe debet."

Sect. CCLIV.

So likewiſe by alluvion, and the force of a river.

The ſame is to be determined of *alluvion*, and ground ſeparated *by the force of a river*. For as to the former, as nothing certain can be known concerning the origine of particles gradually annexed to our ground (§ 251), there is no doubt but what is added to our ground in that manner is acceſſion to us; and what is thus added to a public way, or any public ground, accedes to the public *. On the other hand, when the maſter of the ground carried off is known (§ 251), no change can be made in this caſe as to dominion, unleſs the maſter abdicates and leaves what is thus taken away from his poſſeſſion; which in governments is commonly inferred from the not claiming it during a certain time fixed by law, §. 2. Inſt. de rerum diviſ. l. 7. §. 2. D. de adqu. rerum dom.

* And upon this foundation is built the diſtinction of lawyers and meaſurers of ground between *arcifinious grounds*, which are not bounded by any other but their natural limits, and ſuch as are encompaſſed with artificial bounds, and parcelled out by a certain meaſure, as by the number of acres, l. 16. D. de adqu. Dom. l. 1. § 6. D. de flumin. of which difference between lands, ſee Iſidor. orig. 11. 13. Auctores de limitib. p. 203. edit. Guil. Goeſii. Jo. Fr. Gron. ad Grotium de jure belli & pacis, 2. 3. 16. 1. For what lies between artificially limited grounds and a river, it is either public, or the propriety of ſome private perſon. But in neither of theſe caſes, does any thing accede to limited ground.

Sect. CCLV.

By a river's changing its channel and inundation.

In fine, as to a river's *changing its channel*, if the channel it deſerts, as far as can be known, was in the dominion of no perſon, it cannot accede to thoſe who poſſeſs the adjoining lands in proportion to their grounds, as the Roman lawyers thought, l. 7. §. 5. D. de adqu. rer. dom. But becauſe the property of the river of which the channel is a part, is certainly known (§ 251), it will, as a part of the river, be his to whom the river belonged; as, for the ſame reaſon, the new channel, if again deſerted, without doubt belongs no leſs to the firſt maſters, than an overflown ground, after the water retires from it *.

* It is otherwiſe, if the inundation be perpetual, ſo that it *becomes now ſea where Troy ſtood*, according to the ſaying; for then the ground is as it were extinct, and can be of no utility to any one. But of a non-entity, or what can be of no advantage to any perſon, there can be no dominion, no propriety (§ 235). Whence it follows, that their caſe is extremely hard, who are ſtill obliged to pay tributes or taxes for lands long ago ſwallowed up by an inundation, unleſs, perhaps, they may have deſerved it by their negligence in reſtoring the dikes, tho' even a penalty in that caſe ſeems unreaſonable and cruel: For why ought things to be burdened with taxes, or impoſts to be exacted, when the propriety, the uſufruct, the poſſeſſion or paſſage are loſt? l. 23. de quibus modis uſusfr. amit. l. 3. § 17. l. 30. § 3. D. de adqu. poſſeſſ. l. 1. § 9. D. de itin. actuque priv.

Sect. CCLVI.

Of acceſſion by induſtry, firſt axiom.

Let us now conſider *induſtrious* and *mixed* acceſſion, concerning which ſome lawyers have treated with ſo much ſubtlety. And we think, if the things be joined by mutual conſent, it cannot be doubted but each is maſter according to his proportion, and in this caſe there is a poſitive community introduced (§ 231). But we are here ſpeaking of an acceſſion made without the other's conſent. Now, ſeeing a maſter has a right to exclude all from the uſe of what is his (§ 231), he has a right certainly to hinder any thing from being joined to what is his againſt his will. Wherefore, ſince what is added to any thing of ours, either renders it uſeleſs, or at leaſt worſe, or renders it more valuable and better, becauſe he who renders our goods worſe hurts us (§ 178); the conſequence is, that he who has rendered our goods either uſeleſs or worſe by any induſtrial acceſſion, is obliged, taking the ſpoilt goods, to repair our damage; and if he did it by deceit, and with evil intention, he is likewiſe liable to puniſhment (§ 211).

Sect. CCLVII.

Second and third axiom.

But if our goods are rendered better and more valuable by any artificial acceſſion, then there is a great difference when the two things can be ſeparated without any conſiderable loſs, and when they cannot. In the former caſe, ſince the maſter of each part hath a right to exclude all others from the uſe of what belongs to him (§ 231); but that cannot now be done otherwiſe than by ſeparating the two things; the conſequence is, that in this caſe the things are to be immediately ſeparated, and to each is to be reſtored his own part. But, in the other caſe, the joined things ought to be adjudged to one or other of the two, the other being condemned to pay the value of what is not his to the owner who is thus deprived of it *; and if there be any knavery in the matter, puniſhment is deſerved (§ 211).

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* For whoſoever intercepts any thing from another, he ſtands in need of for his ſuſtenance or agreeable living, injures him (§ 190); but he who injures one is bound to ſatisfaction (§ 210), which, when what is done cannot be undone, conſiſts in making a juſt eſtimation of the thing, and paying it (§ 212); wherefore, he who deſires to intercept any thing belonging to another perſon, and to appropriate it to himſelf, is obliged to pay its juſt value. Whence this law appears to be very equitable, "That none ought to become richer at the expence or detriment of another."

Sect. CCLVIII.

A fourth axiom, &c.

But ſince in the laſt caſe, the joined things are to be adjudged to ſome one of the two, there (§ 257) ought to be ſome good reaſon why one ſhould be preferred (§ 177): becauſe therefore, there can be no other beſides the ſuperior excellence of one of the two things, which is oftner meaſured by rarity and affection than by utility; hence we infer, that the rule which adjudges *the acceſſory to its principal*, is not always equal. Juſtinian himſelf,

ſelf, and before him Caius, acknowledged the abſurdity of it in the caſe of a picture, § 34. In. de rer. diviſ. l. 9. § 2. D. de adqu. dom. And therefore the joined things ought to be aſſigned to him whoſe part is of the greateſt price*, either on account of its rarity, or of his affection, labour, care and keeping; and the other ought to be condemned to make an equivalent to him for what was his, if he inſiſts upon it, and does not rather chooſe to make a preſent of it to the other.

* The ancient lawyers did not found in this matter upon any certain natural reaſon, and therefore divided into different opinions, as is obſerved by Jo. Barbeyrac upon Pufendorff, of the duties of a man and a citizen. The firſt who attempted to reduce this affair into order, and to diſtinguiſh things that had been confounded together, was Chriſti. Thomaſius diſſertat. ſingulari, de pretio adfectionis in res fungibiles non cadente, Hal. 1701, where he has by the ſame principles moſt accurately examined the doctrines of the Roman lawyers concerning acceſſion by induſtry.

Sect. CCLIX.

What is juſt with reſpect to ſpecification.

Hence we may plainly ſee what ought to be determined in the caſe of *ſpecification*, by which a new form is given to materials belonging to another. For ſince very frequently all the affection or value is put upon the form on account of the workmanſhip or art, and none at all is ſet upon the ſubſtance (§ 258), a new ſpecies will rightly be adjudged to him who formed it *; but ſo as that he ſhall be obliged to make a juſt equivalent for the price or value of the materials, and ſhall be liable to puniſhment, if there be any fraud or knavery in the caſe (§ 256). So Thomaſius, in the diſſertation above quoted, § 43. & ſeq. Yet for the ſame reaſon above mentioned, the owner of the ſubſtance ought to be preferred, if it be rarer and of greater value than the form added to it by another's labour and art: *e. g.* if one ſhall make a ſtatue or vaſe of Corinthian braſs, amber, or any precious matter belonging to another, the owner of the materials ſhall have it, but he ſhall be obliged to pay for the workmanſhip, provided the faſhioner acted *bona fide*, *i. e.* without any fraudulent deſign.

* There is no ſolidity in the diſtinction by which Juſtinian propoſed to clear this intricate queſtion, § 25. Inſt. de rer. diviſ. whether the new form could be reduced without hurting the ſubſtance, or not? For there is no good reaſon why, in the former caſe, the owner of the materials, and in the latter the faſhioner ſhould be preferred, eſpecially, ſeeing the matter without the faſhion is frequently of very little value. (See Pufend. of the law of nature and nations, 4. 7. 10.) Yea ſometimes the faſhion, is of a hundred times more value than the materials. Now who will ſay in this caſe, that the form belongs to the owner of the ſubſtance, becauſe the faſhion may be deſtroyed, and the ſubſtance reduced to its firſt ſtate? But ſince the value of the planks can be more eaſily paid than the value of the ſhip made of them, who therefore will adjudge the ſhip to the owner of the planks, becauſe the ſhip can be taken down. If an old ſhip be repaired with another's timber, Julian follows our principle in this caſe, l. 61. D. de rei vind. and yet without doubt the materials can alſo be reduced to their former ſtate, even when a new ſhip is built with planks belonging to another, l. 26. pr. D. de adqu. rer. dom.

Sect. CCLX.

What with regard to adjunction, incluſion, &c.

Again, *adjunction* is no inconſiderable ſpecies of induſtrious acceſſion, when ſomething belonging to another is added to our goods by incluſion, by ſoldering with lead, by nailing or iron-work, by writing, painting, *&c.* Now ſince incloſing is often of ſuch a kind, that the things joined may be ſevered without any great loſs, in ſuch caſes the things may be ſeparated, and every one's own reſtored to him, and this is equal (§ 257): There is certainly no reaſon why the gold may not be reſtored to whom it belongs, when another's precious ſtone is ſet in it, and the gem to its owner. And the ſame holds with regard to ſoldering, faſtening, interweaving,

weaving, and other ſuch like caſes, when the things can be ſeparated without any conſiderable loſs: Otherwiſe the joiner ought to be preferred, becauſe the ſubſtance rarely admits of any price of affection * (§ 258).

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* Beſides, it would not ſeldom be an inconvenience to the owner of the materials, if he were obliged to retain them with the acceſſion, and to pay the price of the thing adjoined, eſpecially if it be what he cannot uſe on account of his condition, age, or other circumſtances, *e. g.* if one ſhould add to the veſtment of a plebeian a *laticlave*, or much gold lace, the materials are in ſuch a caſe, as to uſe, rendered truly worſe to him, or quite uſeleſs. But whoever renders our materials worſe or uſeleſs to us, is obliged to take the ſpoilt goods, and to repair our damage; and if there be any fraud or knavery in the caſe, he is alſo liable to puniſhment (§ 256).

Sect. CCLXI.

What as to building upon, &c.

If any one builds upon his own ground with the materials of another perſon, when there was no knavery in the deſign, and the building is of timber, there is no reaſon why, if the miſtake be very ſoon diſcovered, the building may not be taken down, and the timber be reſtored to its proprietor * (§ 257). But if the building be of ſtone, or if the timber would afterwards be uſeleſs to its owner, it will then be moſt equal to ſay, that the builder ſhould have the property of the building, but be obliged to make a juſt ſatisfaction, for the materials, and be moreover liable to puniſhment, if there is any knavery in the caſe (257 and 258). If one build with his own materials upon another's ground, if the building can be taken down without any conſiderable loſs, it ought to be done (§ 257); or what admits of a price of affection ought to be adjudged to the proprietor of the ground (§ 258), unleſs the building be plainly of no uſe to the lord of the ground, in which caſe the builder retaining the building to himſelf, is bound to pay the worth of the ground, and if there be any bad intention, he is moreover liable to puniſhment.

* The reaſon why the *Decemviri* forbid timber edifices to be pulled down was, that cities might not be moleſted with ruins, l. 6. D. ad exhib. l. 7. § 10. de adqu. rerum dom. l. 1. D. de tigno juncto, and is merely civil, and has nothing in natural reaſon to ſupport it. Hence many nations, where the houſes were not built of ſtone but of timber, not only allowed but commanded by their laws buildings in this and like caſes to be pulled down. See jus. prov. Sax. 2. 53. and what I have obſerved on this ſubject in my Elements juriſ. Germ. 2. 3. 66. To which I now add the Lombard Conſtitution, 1. 27. 1.

Sect. CCLXII.

As to writing and painting.

There is leſs difficulty as to writing and painting. For ſince thoſe things upon which another ſets no value, are to be left to him who puts a value upon them (§ 258), and the value for the moſt part falls upon the writing and painting, and never upon the cloth or paper, the paper ought to yield to the writing, and the board or cloth to the painting, if the writer and painter will make ſatisfaction for them *. And if the painting and writing have no value, as if one ſhould ſcrible a little upon my paper, or dawb my board with fooleries, even in this caſe, the writer and painter ought to take the thing, and pay the value of the paper or board by the firſt axiom (§ 256).

* It is ſtrange that the Roman Lawyers, ſome of whom agreed to this principle, in the caſe of painting, ſhould not admit it in the caſe of writing. As if it were more tolerable that the writing of a learned man ſhould become an acceſſion to a trifle of paper, than that the painting of Appelles or Parrhaſius ſhould become an acceſſion to a contemptible piece of board. Beſides, when the Roman lawyers compare writing with building upon one's ground, § 23. Inſt. de rerum diviſ. l. 9. D. de adqu. dom. may it

not very reaſonably be asked, why there ſhould not be room for the ſame compariſon with regard to painting? And what likeneſs can there be imagined between the ground upon which one builds, and the paper upon which one writes? The one we ſeldom or never can want without ſuffering very great loſs: The other we do not value, provided we receive ſatisfaction for it, or as much paper of the ſame goodneſs. This is a poetical reſemblance taken from the action of writing, upon which account the Latin writers uſed the phraſe *exarare literas* for *ſcribere.* But ſuch a ſimilitude of things is not ſufficient to found the ſame deciſion about them in law and equity.

Sect. CCLXIII.

With reſpect to confuſion and mixture.

Further, as to the *mingling* of liquids, or the *commixture* of dry ſubſtances, tho' the Roman lawyers have treated of a difference with much ſubtlety, l. 23. §. 5. D. de rei vind. yet there is none. For if things be mixed or confounded by the mutual conſent of parties, the mixed ſubſtance is common, and ought to be divided between them proportionably to the quantity and quality of the ingredients (§ 256). If it be done againſt the will of one of them, then the ſubſtance, which is of no uſe, ought to be adjudged to the mixer, and he ought to make ſatisfaction, and to undergo a penalty if he had any bad or fraudulent intention, (§ 256); but yet, if one would rather have a part of the ſubſtance than the price of his materials, there is no doubt that he now approves the mixture which he at firſt oppoſed, and therefore a proportionable part of the common matter cannot be refuſed to him *.

* For ſubſequent approbation is conſent, tho' it be leſs imputable than command and previous conſent (§ 112): Wherefore, if by an accidental confuſion of our metals, a matter of great value ſhould be produced, like the Corinthian braſs by the burning of Corinth; there can be no reaſon why we may not claim each a ſhare of the common matter: for ſince it would have been common if it

had been made by our conſent (§ 256), and approbation is adjudged conſent (§ 112), there is no reaſon why it ſhould not become common by approbation, and every one have his proportionable ſhare.

Sect. CCLXIV.

About mixed acceſſions, ſowing and planting.

To conclude; by the ſame principles may we determine concerning *ſowing* and *planting*, which were above referred to the *claſs of mixed acceſſions*, (§ 250). For trees and plants, before they have taken root, may be ſevered from the ſoil without any great loſs, and ſo be reſtored to their owners (§ 257); but when they have taken root, as likewiſe ſeed ſown, ſeeing they cannot eaſily be ſeparated from the ſoil, and yet do not admit of a price of fancy or affection, they are acquired to the proprietor of the ſoil, he making ſatisfaction for the value of the trees or ſeed, and the expences of culture (§ 258), unleſs, in this laſt caſe, the proprietor of the ſoil is willing to leave the crop to the ſower for a reaſonable conſideration *.

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* For which the lord of the ſoil may have juſt and proper reaſons: As for inſtance, if the ground was ill-dreſſed or ill-ſown, ſo that he has no ground to expect a good crop: Then the crop would be of little uſe to him, and the firſt axiom is in his favour (§ 256).

Sect. CCLXV.

About the fruits of trees in one's neighbourhood.

As to a *tree* in our neighbourhood, he who plants it, conſents that a part of its branches ſhould hang over into the court of his neighbour; and the neighbour, who has a right to exclude others from his court, by not doing it, alſo conſents to it; wherefore the acceſſion being made with the mutual conſent of both parties, the tree is common, (§ 256); and for this reaſon, while it ſtands in the confines, it is common in whole, and when it is pulled up, it is to be divided in common: ſo that in the former caſe the leaves and fruits are in common; and in the latter caſe the timber is to be divided between the two neighbours in proportion *.

* This ſimplicity is preferred by our anceſtors to the ſubtleties of the Roman law, concerning the nouriſhment attracted by the roots of trees, which gradually changes their ſubſtance, l. 26. § 2. D. de adqu. dom. For the nations of a German extraction conſidered the branches of trees more than their roots, as we have ſhewn in our Elem. of the German law, 2. 3. 69.

REMARKS on this chapter.

The queſtions in this chapter, however intricate they may appear at firſt ſight, or as they are commonly treated by the doctors of law, are in themſelves very ſimple and eaſy. Nothing more is neceſſary than to ſtate them clearly, or in the ſimpleſt terms, in order to diſcover on which ſide the leaſt hurt lies. Our Author's diviſions and definitions are exceeding diſtinct: And all his determinations turn upon this ſimple principle he had in the preceeding chapters fully cleared, "That no injury ought to be done; and injuries that are done ought to be repaired." He ſets out in this chapter, as good order and method requires, by inquiring into the nature and origine of dominion and property. And tho' I think he hath handled this curious queſtion, which hath been ſo ſadly perplexed by many moraliſts, better than moſt others, yet ſomething ſeems to me ſtill wanting to compleat his way of reaſoning about it. Our Locke, in his treatiſe on Government, book 2. c. 4. as Mr. Barbeyrac hath obſerved in his notes on Pufendorff of the law of nature and nations, b. 4. c. 4. hath treated this queſtion with much more perſpicuity and accuracy than either Grotius or Pufendorff. The book being in every one's hands, I ſhall not ſo much as attempt to abridge what he ſays on the head. The ſubſtance of it is contained in this ſhort ſentence of Quintilian, Declam. 13. "Quod omnibus naſcitur, induſtriæ præmium eſt." "What is common to all by nature, is the purchaſe, the reward of induſtry, and is juſtly appropriated by it." Let us hear how our Harrington expreſſes himſelf upon this ſubject (the original of property) in his art of law-giving, chapter 1. at the beginning, in his works, p. 387 "The heavens, ſays David, even the heaven of heavens are the Lords, but the earth has he given to the children of men: yet ſays God to the father of theſe children, in the ſweat of thy face ſhalt thou eat thy bread, Dii laborantibus ſua munera vendunt. This donation of the earth to man, comes to a kind of ſelling it for induſtry, a treaſure which ſeems to purchaſe of God himſelf. From the different kinds and ſucceſſes of this induſtry, whether in arms, or in other exerciſes of the mind or body, derives the natural equity of dominion or property; and from the legal eſtabliſhment or diſtribuion of this property (be it more or leſs approaching towards the natural equity of the ſame) proceeds all government." Now, allow me to make ſome very important obſervations upon this principle, which, as ſimple as it appears, involves in it many truths of the laſt importance, in philoſophy, morality and politics. 1. That man is made to purchaſe every thing by induſtry, and induſtry only, every good, internal or external, of the body or mind, is a fact too evident to be called into queſtion. This hath been long ago obſerved. When Mr. Harrington ſays, "Nature or God ſells all his gifts to induſtry," he literally tranſlates an ancient Greek proverb: *Θεοὶ τἀ γαθὰ τοῖς πόνοις πολοῦνται,* (ſee Eraſmi adagia) as did the Latins in their many proverbial ſentences to the ſame purpoſe, "Labor omnia vincit:" "Omnia induſtriæ cedunt," &c. See Virg. Georg. 1. v. 121, &c. 2. But as ancient and evident as this obſervation is, yet none of the ancient philoſophers ever had recourſe to it in the celebrated queſtion, "Unde bonis mala, &c." *i. e.* about the promiſcuous diſtribution of the goods of fortune (as they are commonly called) in this life; tho' this fact contains a ſolid refutation of that objection againſt providence, and from it alone can a true anſwer be brought to it. Mr. Pope in his *Eſſay on Man*, ep. 4. v. 141, &c. (as I have taken notice in my *Principles of Moral Philoſophy*, part 1. chap. 1. and chap. 9. and part 2. chap. 3.) is the firſt who hath given the true reſolution of this ſeeming difficulty from this principle, that according to our conſtitution, and the frame of things, the diſtribution of goods internal or external, is not promiſcuous; but every purchaſe is the reward of induſtry. If we own a blind fortuitous diſpenſation of goods, and much more, if we own a malignant diſpenſation of them, or a diſpenſation of them more in favour of vice than of virtue, we deny a providence, or aſſert bad adminiſtration. There is no poſſibility of reconciling bad government with wiſdom and goodneſs; or irregularity and diſorder with wiſdom and good intelligent deſign, by any future reparation. But the alledgeance is falſe; for in fact, the univerſe is governed by excellent general laws, among which this is one, "That induſtry ſhall be the purchaſer of goods, and ſhall be generally ſucceſsful." And that being the fact, the objection which ſuppoſes promiſcuous, fortuitous, or bad government, is founded upon a falſity in fact. In fine, there is no way of proving providence, but by proving good government by good general laws; and where all is brought about according to good general laws, nothing is fortuitous, promiſcuous or bad. And not to mention any of the other general laws in the government of the world, conſtituting the order according to which effects are brought about; and conſequently the means for obtaining ends to intelligent active creatures; what better general law can we conceive with regard to intelligent active beings, than the general law of induſtry; or can we indeed conceive intelligent agency and dominion without ſuch a law? Are not the two in-

inſeparable, or rather involved in one another? But where that law obtains, there is no diſpenſation or diſtribution properly ſpeaking; for induſtry is the ſole general purchaſer, in conſequence of means uniformly operative towards ends. But having elſewhere fully inſiſted upon this law of induſtry, in order to vindicate the ways of God to man; let me obſerve, 3. in the third place, Mr. Harrington is the firſt who hath taken notice, or at leaſt fully cleared up the conſequences of this general law of induſtry with reſpect to politics, that is, with reſpect to the natural procreation of government, and the natural ſource of changes in government. Every thing hangs beautifully and uſefully together in nature. There muſt be manifold mutual dependencies among beings made for ſociety, and for the exerciſe of benevolence, love and friendſhip; that is, there muſt be various ſuperiorities and inferiorities; for all is giving and receiving. But dependence, which ſuppoſes in its notion ſuperiority and inferiority, muſt either be dependence in reſpect of internal, or in reſpect of external goods; the former of which Mr. Harrington calls *hanging on the lips*, and the other *hanging on the teeth*. Now the law of induſtry obtaining amongſt men placed in various circumſtances (and all cannot be placed in the ſame) will naturally produce theſe dependencies. A greater ſhare of wiſdom and virtue will naturally procreate authority, and the dependence on the lips. [This perhaps is the meaning of that ancient ſaying of Democritus mentioned by Stobæus, ſerm. 27. " φὺσει τὸ ἄρχειν ὀικήιον τω κρεισσονι," " Authority falls naturally to the ſhare of the better, more excellent or ſuperior."] And a greater ſhare of external goods, or of property, naturally begets power, and the other dependence on the teeth. And hence it will and muſt always hold as a general law, That dominion will follow property, or that changes in property will beget certain proportional changes in government: and this conſequently is the natural ſeed, principle or cauſe of procreation and viciſſitude in government, as Mr. Harrington has demonſtrated fully and accurately. I only mention theſe things here, becauſe we ſhall have occaſion to have recourſe to them afterwards, when our Author comes to treat of government. The concluſion that more properly belongs to our preſent purpoſe is, 4. in the fourth place, It muſt neceſſarily have happened ſoon after the world was peopled, that all was, muſt have been appropriated by poſſeſſion and induſtry: and therefore, at preſent, our buſineſs is to determine how, things being divided and appropriated, the duties of mankind ſtand. But it is clear, 1. in the firſt place, that ſuppoſe the world juſt beginning to be peopled, or ſuppoſe a conſiderable number of men juſt caſt aſhore upon a deſart country (ſetting aſide all compacts and regulations previouſly agreed upon) every one will have a right to the purchaſe of his induſtry; to the fruits of his labour; to improve his mind, and to all the natural benefits and rewards of that culture; and to the fruits of his ſkill, ingenuity and labour, to get riches, with all the natural benefits and rewards of them; but yet every one will be obliged, in conſequence of what hath been already ſaid of the law of love and benevolence, to exerciſe his abilities, and to uſe his purchaſes in a benevolent way, or with tender regard to others. This muſt be the caſe with regard to our right and obligation, previous to all compacts, conventions or regulations. 2. And where lands are already appropriated, and civil government ſettled, this is a true principle ſtill, that one has a right to all the purchaſes of his induſtry, with reſpect either to external or internal riches, (if I may ſo ſpeak) conſiſtent with the law of benevolence, or the law of not injuring any one, but of doing all the good to every one in our power; and hence it is, that every one in formed ſociety hath a right to his purchaſes by the arts of manufacture and commerce, *&c.* Tho' a ſtate, to fix the balance of dominion or of government, may fix the balance of property in land, and likewiſe make regulations about money, (as in the Commonwealths of Iſrael, Lacedemon, Athens, Rome, Venice, &c. in different manners) in conſequence of the natural connexion between the balance of property and the balance of dominion: Tho' this may be done in forming or mending government by conſent, yet even where an Agrarian law obtains, this principle muſt hold true and be untouched, that every one has a right to the purchaſes of his induſtry, in the ſenſe aboved limited: For otherwiſe, there would be no encouragement to induſtry, nay, all muſt run into endleſs diſorder and confuſion. 3. And therefore univerſally, whether in a ſtate of nature, or in conſtituted civil governments, this muſt be a juſt, a neceſſary principle, that induſtry gives a right to its purchaſes, and all the benefits and rewards attending them. 4. And therefore, fourthly, it can never be true, that a perſon may not, as far as is conſiſtent with benevolence, endeavour to have both power and authority. If we conſider what would be the conſequences of denying this principle, that is, of ſetting any other bounds to the purchaſes of induſtry but what the law of benevolence ſets, we will ſoon ſee that this muſt be univerſally true. And if we attend to our frame, and reaſon from it to final cauſes, as we do in other caſes, it is plain, that there is in our conſtitution naturally, together with a principle of benevolence, and a ſenſe of public good, a love of power (of *principatus*, as Cicero calls it in the beginning of his firſt book of offices) without which our benevolence would not produce magnanimity and greatneſs of mind, as that deſire of power would, without benevolence and a ſenſe of public good, produce a tyrannical, overbearing and arrogant temper. Some moraliſts do not ſeem to attend to this noble principle in our nature, the ſource of all the great virtues, while others aſcribe too much to it (as Hobbes), and conſider it as the only principle in our nature, without taking our benevolence and ſenſe of public good, which are as natural to us, into the account, (See what I have ſaid on this head in my *Principles of Moral*

Philoſophy.) But both principles belong to our conſtitution ; and therefore our virtue conſiſts in benevolent deſire of, and endeavour to have authority and power in order to do good. 5. It is in conſequence of this principle, that it is lawful to have dependents or ſervants, and that it is lawful to endeavour to raiſe ourſelves, or to exert ourſelves to encreaſe our power and authority. The great, ſweet, the natural reward of ſuperiority in parts and of riches, and conſequently the great ſpur to induſtry, is the dependence upon us it procreates and ſpreads. And why ſhould this noble ambition acknowledge any other bounds but what benevolence ſets to it : Any other limits but what the Author of nature intended ſhould be ſet to it, or rather actually ſets to it, by making the exerciſes of benevolence ſo agreeable to us, as that no other enjoyments are equal to them in the pleaſure they afford, whether in immediate exerciſe, or upon after reflection ; and in making mankind ſo dependent every one upon another, that without the aid and aſſiſtance of others, and conſequently without doing what he can to gain the love and friendſhip of mankind, none can be happy, however ſuperior in parts or in property he may be to all about him. Every man ſtands in need of man ; in that ſenſe all men are equal ; all men are dependent one upon another ; or every man is ſubjected to every man. This obſervation is ſo much the more neceſſary, that while ſome moral writers aſſert, that man has a right to all things and perſons to which his power of ſubjecting them to his uſe can extend or be extended ; others ſpeak of our natural equality in ſuch a manner as if nature had not deſigned any ſuperiorities among mankind, and as if all deſire of, or endeavours after power or authority were unlawful ; which laſt muſt reſult in aſſerting, that all culture of the mind, and all induſtry are unlawful, becauſe the natural conſequence of the one is ſuperiority in parts, and the natural effect of the other is ſuperiority in property ; while the other terminates in affirming there is no diſtinction between power and right, or between power rightly and power unreaſonably applied, *i. e.* no diſtinction between moral good and ill, *i. e.* no diſtinction between reaſonable and unreaſonable ; which difference muſt remain, while there is ſuch a thing as public good or benevolence, or ſuch a thing as reaſon, as hath been already fully proved. 6. If the preceeding principles be true, due attention to them will lead us through moſt of our Author's ſucceeding queſtions about derivative acquiſitions and ſucceſſion. Becauſe the effect of property, which makes it the great reward of induſtry, is a right to diſpoſe of our own in our life, or at our death, which admits no limitations but what benevolence ſets to it ; in conſequence of which right and duty, ſucceſſion to him who dies without making a diſpoſition of his eſtate, ought to take place in the way a wiſe man, directed by benevolence, muſt be preſumed to have intended to diſpoſe of his own at his death, *i. e.* according to the natural courſe in which benevolence ought to operate and exert itſelf, already taken notice of. For when the will of a perſon is not declared, his will ought to be inferred from his duty. We ſhall therefore for ſome time have but little occaſion to explain or add to our Author.

CHAP. X.

Of derivative acquiſitions of dominion or property made during the life of the firſt proprietor.

Sect. CCLXVI.

Tranſition to derivative acquiſitions.

DOminion being acquired, a change ſometimes happens, ſo that one acquires either property or dominion in a thing, neither of which he before had; and ſuch *acquiſitions* we called above, (§ 240), *derivative.* Now, ſeeing the thing in which we acquire property was before that common: the thing in which we for the firſt time acquire dominion, was before that the property of ſome perſon: as often as we receive our own proper ſhare of a common thing, there is *diviſion*; as often as we acquire the whole thing in property, there is *ceſſion* *; and as often as another's property paſſes by his will into our dominion, there is, as we called it above (§ 240), *tradition*, or transferring.

* The term *ceſſion*, is ſometimes taken in a larger acceptation, ſo as to ſignify all transferring of rights or actions from one to another. But ſince in that ſenſe it may be comprehended under *tradition*, we uſe it here in a more limited ſignification, and mean by it, *the transferrence of right and dominion common to many, to one of the aſſociates made by the conſent of the reſt.* Thus, *e. g.* if co-heirs transfer their whole title of inheritance to one of the coheirs, they are ſaid to have *ceded* their title or right to him.

Sect. CCLXVII.

By them is made alienation neceſſary, voluntary, pure, or conditional.

In all theſe caſes, what was ours ceaſes to be ours any longer in whole or in part, and paſſes into the dominion or property of another perſon; and this we call *alienation*, which, when it proceeds from a prior right in the acquirer, is termed *neceſſary*; when from a new right, with the conſent of both parties, it is called *voluntary* *. But the effect of either is, that one perſon comes into the place of another, and therefore ſucceeds both to his right in a certain thing, and to all the burdens with which it is incumbered. Alienation is called *pure*, when no circumſtance ſuſpends or delays the tranſferrence of the dominion; and when the transferrence is ſuſpended, it is called *conditional* alienation.

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* Thus the alienation of a thing common to many, which is made when one of the aſſociates demands a diviſion, is neceſſary, becauſe he who inſiſts upon a diviſion has already a right in the thing. In like manner, the alienation of a thing pledged to one is neceſſary, becauſe it is done by virtue of the right the creditor had already acquired in that thing. On the other hand, the alienation of houſes, which, one who is to change his habitation, ſells, is voluntary, no perſon having a right in them. Thus is the diviſion in the Roman law to be explained, l. 1. D. de fund. dot. l. 2. § 1. D. de rebus eorum qui ſub tut. l. 13. l. 14. D. fam. erciſc. and elſewhere frequently.

Sect. CCLXVIII.

And that either for the preſent time, or for a time to come.

Voluntary alienation cannot be underſtood or take place otherwiſe than by the conſent of both parties: but there may be conſent either for a *preſent* alienation, ſo that the dominion may be transferred from us to another in our own life, or for a *future* alienation, ſo that another ſhall obtain the poſſeſſion of what is ours after our demiſe: and this conſent to a future alienation, is either actual, or it is inferred from the deſign and intention of the perſon *. Now by the firſt of theſe is what is called *teſtamentary ſucceſſion*; and by the latter is what is termed *ſucceſſion to one who dies inteſtate*. We ſhall now treat of *preſent* alienation, and in the ſucceeding chapter we ſhall conſider *future* alienation.

* We therefore refer to future alienation, that poſſeſſion of our goods which devolves upon a perſon after our death. If this be done by ourſelves truly willing it, ſuch a will is called a *teſtament*, and ſucceſſion by virtue of ſuch a will is called *teſtamentary ſucceſſion*. But if it be inferred from the deſign and intention of the defunct, that he willed his inheritance to paſs to certain perſons, preferably to all others, this is *ſucceſſion to an inteſtate*. Now, againſt both theſe ways of ſucceſſion it may be objected, that no perſon can will any thing at a time when he cannot will at all; and that alienation cannot be made in this manner by a perſon while he lives, becauſe he does not transfer neither right nor dominion to heirs while he lives; nor by a dead perſon, becauſe, what he himſelf does not poſſeſs, he cannot transfer. And for theſe reaſons, many very learned men deny that wills are of the law of nature, as Merill. obſ. 6. 25. Thomaſ. not. ad tit. inſt. de teſt. ord. p. 173. Gothofr. de Coccei. diſſ. de teſtam. princ. part. 1. §. 22. & ſeq. If theſe arguments conclude againſt the foundation of wills made by the dying perſon's real declaration of his will, *i. e.* teſtaments, in the law of nature, they conclude more ſtrongly againſt ſucceſſion to inteſtates; and therefore all this doctrine we have now been inculcating concerning *future alienation* is a chimera. But as we eaſily allow that theſe arguments prove wills, as defined in the Roman law, not to proceed from the law of nature. (See my diſſertation de teſtam. jure Germ. arct. limitibus circumſcripta, § 3. ſo we think they do not conclude againſt all ſorts of future alienation and ſucceſſion. And what the law of nature eſtabliſhes concerning them, ſhall be enquired in the following chapter.

Sect. CCLXIX.

What diviſion is, and why one may demand it.

The tranſition from community to property is made by *diviſion* (§ 266), which is an aſſignation to any of the aſſociates of his competent part of the whole in poſitive community. Now ſeeing any aſſociate or ſharer can exclude all but his fellow aſſociates or ſharers from the uſe of the thing common to them (§ 231); the conſequence is, that any of the aſſociates may demand the uſe of the thing according to the ſhare belonging to him, and therefore may demand a diviſion; and the others, if they ſhould oppoſe a diviſion, are ſo much the leſs to be heard, that poſitive community doth very ill ſuit the preſent ſtate of mankind * (§ 238).

* For ſince ſuch a communion can only ſubſiſt among men endowed with great virtue, and it muſt become inconvenient in proportion as juſtice and benevolence wax cold and languid (§ 238), how can it hold long in our times? Which of two aſſociates does not envy the other? Who is ſo careful about a common thing as his own? How apt is one to hinder another when he would medle with a common thing? Who does not endeavour to intercept a part of his aſſociate's profits? Hence a thouſand animoſities and contentions, as Ariſtotle has demonſtrated, in oppoſition to the Platonic communion, Polit. 2. 2. So that the Romans had reaſon to pronounce partnerſhip and communion the mother of diſcord, and to give power to any aſſociate to demand a diviſion, l. 77. § 2. D. de legat. 2.

Sect. CCLXX.

How it may be done whether the ſubject be diviſible or indiviſible.

A ſubject is either eaſily *diviſible* into parts, or it is *indiviſible*; either becauſe in the nature of the thing, or by laws and cuſtoms, it cannot be divided into parts. If therefore an aſſociate demand a diviſion of a thing in its own nature diviſible, nothing is more equal than to divide it into as many parts as there are aſſociates, and to commit the matter to the deciſion of lot. But if the thing be indiviſible, it is either to be left to one of the aſſociates, who can pay, and bids moſt for it, or to whom age or chance gives a preference, who, a valuation being made, is to ſatisfy the reſt; or it is to be ſold to the beſt advantage, and the price is to be divided proportionably among the ſharers; or they are to have the uſe of it alternately, each in his turn.

* Thus we know the land of Paleſtine was divided among the Hebrews by lot, it having been ſeparated in parts according to the number of their tribes. On the other

hand, it often happens among co-heirs, that one of them, either with the conſent of the reſt, or by the deciſion of lot, buys at a certain price the whole indiviſible inheritance, and gives every one of the reſt his ſhare of the price. It likewiſe ſometimes happens, that none of the co-heirs being rich enough to be able to ſatisfy the reſt, the inheritance is ſold to a ſtranger upon the beſt terms, and the co-heirs divide the price. Finally, Diether. in contin. theſauri Beſold. voce *Mutſchirung*, p. 417. Wehner obſerv. pract. ibidem, p. 370, have obſerved, that the alternate uſe of a common thing hath ſometimes been agreed to by illuſtrious brothers, which is in ſome places called *Die Mutſchirung*. We have an inſtance of it in the family of Saxony in Muller. in Saechſ. annal. p. 203.

Sect. CCLXXI.

When equality is to be obſerved in diviſion of things perfectly common.

Moreover, becauſe with regard to a common thing all may have equal right, or ſome one may have more right than others (§ 231); it is evident that diviſion is either *equal* or *unequal*. In the firſt caſe, all are called to equal ſhares, and in the ſecond, to unequal ſhares. Now, ſince the natural equality of mankind obliges every one not to arrogate any prerogative to himſelf above any other without a juſt reaſon, in things belonging to many by perfect right (§ 177); it is manifeſt that diviſion ought to be equal, and that none ought to claim any preference, unleſs his right to it can be clearly proved *.

* Such a pre-eminence may be due to one by law, by compact, and by the laſt-will of the former poſſeſſor, but not on account of greater ſtrength or power, which Hobbes however ſeems to admit of, as giving a juſt prerogative above others in diviſion, (de cive, c. 3. 15). For if ſuch a reaſon be allowed to be juſt, the diviſion of the lion in the fable is moſt fair and equal, Phæd. fab. 1. 5. who being to divide the prey with his fellow hunters, reaſoned in this manner; “ I take the firſt ſhare as called *lion*; the ſecond as being ſtronger you will give me; the third ſhall follow me becauſe I am ſuperior to you all, and woe be to him who dares to touch the fourth. Thus

did his injuſtice carry off the whole booty." Whoever can call this a fair and juſt diviſion, and he only, will grant what Hobbes aſſerts concerning a natural lot (ſortem naturalem) as he calls ſuperior power.

Sect. CCLXXII.

Whether it ought likewiſe to be obſerved in the diviſion of things imperfectly common.

These rules belong to *perfect* community. But there is likewiſe an *imperfect* community, as often as none of the partners hath a perfect right to the thing (§ 231). Now, when by the bounty of another any thing becomes thus common to many perſons, it is at his option to give equal ſhares, or to give more or leſs according to merit*. And in this caſe it would be moſt unjuſt for any one to complain that a perſon of leſs merit is put upon an equal footing with him (Mat. xx. 12, 15), or to take upon him to judge raſhly of his own merit; or to think benefits conferred upon this or the other perſon, may be pled as precedents.

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* And this is that diſtributive (διανεμητικὴ) juſtice which ought to attend all thoſe virtues which purſue the intereſt of others; as liberality, compaſſion, and rectoreal prudence, (the prudence of magiſtrates in conferring dignities, &c.) Grotius of the rights of war and peace, 1. 18. who juſtly remarks, that this juſtice does not always obſerve that comparative proportion, called *geometrical proportion*; and that therefore Ariſtotle's doctrine on this head, is one of thoſe things that often not always takes place, Grotius ibidem, n. 2. Nor is this opinion of Grotius overturned by Puſendorff of the law, &c. 1. 7. 9. becauſe he ſpeaks of the diſtribution of things owing to many of good deſert by perfect right, as by promiſe or pacts. Then what Arrian ſays is abſolutely true, ep. 3. 17. "Such is the law of nature, that he who excels another is in a better condition in reſpect of what he excels in, than one who is worſe or inferior." But in matters proceeding from mere good-will, this law of nature can hardly be pled; nor could theſe veterans juſtly complain of the emperor Hadrian, whom he ordered to rub one another in the bath, tho' ſome days before he had made a preſent of ſervants and money to one of their companions, whom he

ſaw rubbing himſelf againſt the marble, Spartian Had. c. 17. becauſe benefits are not to be wreſted into examples.

Sect. CCLXXIII.

What is ceſſion of a thing in common?

When a thing in common to many is reſigned by the reſt to one of the ſharers, this is called *ceſſion*. Wherefore, ſince in this caſe one ſucceeds into the place of all the others, the conſequence is, that he ſucceeds into all their rights to that thing, and alſo into all the inconveniencies and burdens attending it (§ 267). And hence the Roman lawyers juſtly inferred that the ſame exceptions have force againſt the perſon ceded to, which would have had force againſt the ceder, l. 5. c. de her. vel act. vend.

Sect. CCLXXIV.

The obligation of the partners to make good.

Since, whether the thing in common be divided, or whether it be ceded to one of the ſharers, this ſeems to be the nature of the deed, that thoſe who get the thing by diviſion or by ceſſion, acquire the right of excluding all others from the uſe of that thing; (§ 231) it is manifeſt that in both caſes the aſſociates oblige themſelves, that he to whom the thing is transferred, ſhall not be hindered from taking poſſeſſion of it; and therefore oblige themſelves to warranty, and to repair all his loſs, if it be evicted by another with right, and without the poſſeſſor's fault; ſince they have their ſhares ſafe and entire, while the other hath got a thing with an encumbered or burdened title.

* Thus the doctrine of eviction, which hath found place likewiſe in tradition or transferring, flows from natural equity, tho' many things be added to it by the civil law for clearing it, with reſpect to the form and effect of it, *e. g.* as when it requires that one ſhould transfer to another in his own name; that the poſſeſſor ſhould inform the transferrer of the ſuit in time; that the thing be evicted for a cauſe preceeding the contract; and not by violence, but by right, *&c.*

For every one may diſcern at firſt ſight, that all theſe conditions proceed from natural equity.

Sect. CCLXXV.

What tradition or delivery is, and if neceſſary to the transference of dominion?

We proceed now to *tradition*, by which an owner who has the right and will to alienate, transfers dominion to another, accepting it for a juſt cauſe. I ſay *dominion*. For tho' the Roman law orders the thing itſelf and its poſſeſſion to be transferred, and does ſcarcely allow any right in a thing to ariſe previouſly to delivery : l. 20. C. de pact. yet ſuch ſubtlety cannot be of the law of nature *, as is juſtly obſerved by Grotius of the rights of war and peace, 2. 6. 1. 2. 2. 8. 25. and Pufendorff of the law of nature and nations, 4. 9. 6 : and the Roman lawyers themſelves acknowledge, " That nothing can be more agreeable to natural equity, than that the will of an owner willing to transfer his goods to another, ſhould take place and be confirmed." § 40. Inſt. de rer. diviſ. l. 9. D. de adqu. rer. dom. Whence we conclude, that the will of an owner concerning transferring his dominion to another, whether expreſly declared, or deducible from certain ſigns, is ſufficient to transfer his dominion to another without delivery.

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* Nor did the Romans themſelves anciently require that in every caſe. Delivery was only neceſſary with reſpect to things (nec mancipi) of which one had not the full poſſeſſion, as of provincial farms, Simplic. inter rei agrar. ſcript. p. 76. Things (mancipi) of which one had the property and full poſſeſſion, were alienated (per æs & libram), ſo that the conveyance and title being made, the dominion was immediately acquired. Varro de lingua lat. 4. Therefore, from the time that Juſtinian took away the diſtinction between *res mancipi* and *nec mancipi*, and the *dominium Quiritarum* and *bonitarium*. l. un. C. de nudo jure Quirit. toll. & l. un. C. de uſucap. transform, this law again prevailed, that dominion ſhould be transferred without delivery or putting in poſſeſſion.

Sect. CCLXXVI.

How it is done.

Since therefore the will of the owner to transfer his dominion to another, is equivalent to delivery, and is a valid transferrence of his dominion to another *(§ 275)*, it follows, that it muſt be equal, whether one abſent, by interveening letters or words, or preſent, by giving the thing from hand to hand, or by inducting him into it, whether by long or ſhort hand, or by certain ſymbols, according to the uſage of the province (§ 242), or in whatever way he delivers it; ſo that nothing hinders but that a right may be conveyed or transferred to another without delivery, or by a *quaſi-delivery*.

* That ſymbolical delivery was not unknown to the Romans, appears from l. 1. § pen. D. de adqu. poſſ. l. 9. § 6. D. de adqu. dom. l. 74. D. de contr. empt. And the nations of German origine have been more acute in this matter: For they, in delivering conveyances and inveſtitures, made uſe of almoſt any thing, a ſtalk of a tree, a rod, a turf, a branch, a ſtraw of corn, a ſhrub, a glove, and other ſuch things. See my Elem. juris Germ. 2. 3. 74. & ſeq. to which belongs the *Scotatio* Danica, c. 2. 10. de conſuet. of which Strauchius Amœnit. jur. can. ecl. 5. and alſo Gundlingliana part. 7. diſſ. 4.

Sect. CCLXXVII.

Who has a right thus to transfer dominion.

But ſince he only who hath dominion can transfer it or alienate *(§ 275)*, it is plain that tradition can have no effect, if it be made by one, who either by law, convention, or any other cauſe, hath no right to alienate; much leſs, if it be made by one who is not himſelf maſter of the thing; for none can convey a right to another which he himſelf has not *. But, on the other hand, it is the ſame in effect, whether the maſter himſelf transfers his right immediately by his own will, or by his order and approbation.

* Yet ſuch a tradition, if made to one without his knowledge that it is ſo, conſtitutes an honeſt poſſeſſor till the true owner claims his own. Grotius of the rights of war and peace, 2. 10. and Pufendorff of the law of nature and nations, 4. 13. 6. & ſeq. endeavour to ſhew what ſuch a poſſeſſor is obliged to do in point of reſtitution, what profits he may retain, and what he ought to reſtore, by a multitude of rules. We ſhall treat of this matter afterwards in its own place expreſly (§ 312), and ſhall there ſhew, that the whole affair is reducible into two rules, 1. An honeſt poſſeſſor, during the time that the true owner doth not appear, is in his place, and therefore has the ſame rights that the owner would have, were he in poſſeſſion. 2. When the true owner appears, he, if the thing ſubſiſts, is obliged to reſtore it with its exiſting profits; and if the thing does not ſubſiſt, he is only obliged to make reſtitution, ſo far as he hath been made richer by enjoying it.

Sect. CCLXXVIII.

By transference dominion is not transferred for every cauſe.

Becauſe alienation ought to be made for a juſt cauſe (§ 275); but it is evident, from the nature of the thing, that by a juſt cauſe muſt be underſtood one ſufficient for transferring dominion; therefore dominion cannot paſs to another if a thing be delivered to one in loan, in truſt, or letting; much leſs, if it be delivered to him on requeſt and conditionally, or upon any terms revocable at the pleaſure of the deliverer; yea, that no cauſe is ſufficient, if he, to whom a thing is delivered, does not fulfil his bargain.

* For when alienation is made to a perſon upon condition that he ſhall do ſomething, it is conditional. But becauſe the condition ſuſpends the transferrence of dominion, the conſequence is, that if the other does not perform what he promiſed, the dominion is not transferred, and the tradition becomes of no effect. Hence the Romans pronounced things bought and delivered not to be acquired to the buyer till the price was paid, or other ſatisfaction was made to the ſeller, § 41. Inſt. de rerum diviſ. Hence Varro ſays, de re ruſtica, 2. 2. " A herd ſold does not change its maſter till the money be paid." So Quintilian,

Declam. 336. "By what right can you claim the thing which you have not paid the price of?" So Tertullian de pœnitentia. "It is unreaſonable to lay your hands on the goods, and not to pay the price."

Sect. CCLXXIX.

Nor does one always deliver with that deſign.

Beſides, we ſaid, in order to transfer, one muſt deliver with the deſign and intention of transferring dominion (§ 275). From which it is plain, that tradition cannot be made by infants, by madmen, by perſons diſordered in their ſenſes, and other ſuch perſons, who are preſumed not to know what is tranſacted: nor is it valid, if the owner gives a thing to one with the intention of lending, depoſiting, pawning it, or with any ſuch like deſign; as likewiſe, that any one may reſerve or except whatever right he pleaſes in transferring a thing; and that in this caſe, ſo much only is transferred as the alienator intended to transfer.

Sect. CCLXXX.

The origine of full, and of imperfect dominion.

Whence it is eaſy to conceive the origine of *imperfect* or *leſs full dominion*. For ſince by that is underſtood nothing elſe but dominion, the effects of which are inequally ſhared between two perſons; it is highly probable that its origine is owing to transferrence, with exception, or with reſervation of a part of the dominion; which being done, there are two maſters, one of whom acquires the right of excluding all others from reaping and uſing the fruits and profits of the thing, and of taking them to himſelf; the other has the right either of concurrence with reſpect to the diſpoſal of it, or of exacting ſomething, by which the acknowledgment of his dominion may be evidenced *.

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* The laſt kind of leſs full dominion, the lawyers of the middle ages called *directum*, the former they called *prius utile*; not ſo elegantly indeed, but by terms received at the bar and in the ſchools, and which therefore it is not

now time to diſcard. But the one may be called the *ſuperior (dominus ſuperior vel major)* the other the *inferior maſter (dominus minor)*, after the example of the Romans, who called the *patremfamilias*, *herum majorem*, and the *filiosfamilias*, *heros minores*, Plaut. Capt. 3. 5. v. 50. Trinum 2. 2. 53. Aſinar. 2. 66.

Sect. CCLXXXI.

The various ſpecies of it.

Since the nature of the (dominium utile) or dominion with reſpect to the uſe, is ſuch, that the ſuperior owner reſerves to himſelf the right of concurrence with regard to the diſpoſal of the thing, or the right of exacting ſomething in acknowledgment of his ſuperior dominion (§ 280); the conſequence is, that tho' there may be various kinds of leſs full dominion, yet the whole matter in theſe caſes depends on the agreement of the parties. However, if one ſtipulates with the poſſeſſor of the thing delivered to him for homage and ſervices, and that the thing be not alienated without his conſent; hence ariſe *(feudum)* the right of *fief* or *fealty*; if he ſtipulates that an annual tribute ſhall be paid in acknowledgment of his ſuperiority; hence ariſes *(jus emphyteuticum)* the right of *holding in fee*. Finally, if he ſtipulates for a ground-rent, hence ariſes *(jus ſuperficiei)* the right of *ground-rent* *; and theſe are the principal kinds of dominion with regard to uſe in any nations.

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* Of holding in fee we have an example, Gen. xlvii. 26. according to Joſephus, Antiq. 2. 7. Tho' Hertius thinks the lands of Egypt were rather made cenſual, or paid a land-tax, ad Puffend. jus nat. &c. 4. 8. 3. But if he place the difference between holding in fee and cenſual, in this, that in the former the poſſeſſor has only the dominion of uſe, and in the latter full dominion, it may be clearly proved, that the Pharaoh's of Egypt had a part of the dominion. For the Words of the Patriarch Joſeph are, Gen. xlvii. 23. "This day I have bought you and your lands to Pharaoh." Of the *(jus ſuperficiarium)* or the right of ground-plots, there is a remarkable inſtance in Juſtin. Hiſt. 18. 5. Concerning the origine of fiefs the

learned are much divided, tho' they be common throughout all Europe. That there are many other ſorts of leſs full dominion among the nations of German extract, I have ſhewn in my element. juris Germ. 2. 2. 23. & ſeq.

Sect. CCLXXXII.

If not the thing itſelf, and the dominion of it, but a certain uſe only be conveyed, he who receives it, acquires a *ſervitude* upon a thing belonging to another; and if the uſe be reſtricted to the perſon and life of him who is to have the uſe, it is *perſonal*; and if it be annexed to the eſtate itſelf, the uſe of which is conveyed, it is *real.* Since therefore in all theſe caſes juſt ſo much right is transfered as the transferrer willed to transfer (§ 279), it follows, that in theſe caſes likewiſe the matter comes to be intirely an affair of an agreement between parties; and therefore, almoſt all the ſubtleties to be found in the doctors about ſervices are of poſitive law *.

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* Hence the known tenets, that ſervice conſiſts not in doing, but in ſuffering or not doing; that it is indiviſible, that its cauſe ought to be perpetual, that becauſe the thing is to be uſed and enjoyed without hurting its ſubſtance, uſufruct does not take place, where there is nothing to be uſed or enjoyed: That there is a great difference between uſufruct, uſe, habitation, and the labour of ſervants; that ſome of theſe rights are loſt by change of ſtate, and ſome not: All theſe are of ſuch a nature that right reaſon neither preciſely commands them, nor oppoſes them, but they may be variouſly fixed and altered by pacts and conventions.

Sect. CCLXXXIII.

What right of pawn and mortgage, &c.

If a thing is delivered by the owner to his creditor, ſo that the deliverer continues to have the dominion, but the creditor has the poſſeſſion for his ſecurity, then the thing is ſaid to be *in pawn.* If it be delivered in theſe terms, that the creditor ſhall likewiſe have the fruits of it by way of intereſt, it is called *jus antichreticum*. Finally, if the right of pawn be conveyed to a creditor without delivering the money, we call it *hypotheca, mortgage*. As therefore in the former caſes the creditor has a right, the debt not paid, not only to retain the thing pawned, but alſo to diſpoſe of it, and deduct from the price what is due to him; ſo, in the latter caſe, the creditor may proſecute his right of poſſeſſion of what is pledged to him for his ſecurity, *i. e.* attach it; and then detain it until his debt be paid, or even diſpoſe of it for his payment.

('Tis not improper to take notice here, that this ſort of mortgage called *Antichreſis* in the Roman law, is nearly the ſame with that which is termed *vivum vadium* in the Engliſh law; which is, when a man borrows a ſum of money of another, and maketh over an eſtate of lands unto him, until he hath received the ſaid ſum of the iſſues and profits of the lands, ſo as in this caſe neither money nor land dieth, or is loſt. And therefore it is called *vivum vadium*, to diſtinguiſh it from the other ſort of mortgage called *mortuum vadium*, Coke 1. Inſtit. fol. 205. Domat's civil law, *&c.* by Dr. Strahan, T. 1. p. 356.)

Sect. CCLXXXIV.

How dominion paſſes to the accepter.

To conclude; we ſaid, that by transferring, dominion paſſes to him who *accepts* of the transferrence (§ 275). But we *truly accept*, when we teſtify by words or deeds our conſent that a thing transferred ſhould become ours, and we are *preſumed* to accept, whenever, from the nature of the thing, it cannot but be judged that we would not refuſe or deſpiſe the thing one would transfer to us. In like manner, a thing may be *transferred* by the will of the transferrer, either expreſly declared, or preſumable from certain ſigns (§ 275). The moſt certain ſign is gathered from his end and intention who hath acquired a thing, and hath beſtowed care in keeping and preſerving it *.

* But the end and intention of men in acquiring and managing with great care, is always, not only that they may not want themſelves, but that it may be well with theirs when they are dead and ſtand in need of nothing. Hence Euripides in Medea, v. 1098.

Sed quibus in ædibus eſt liberorum
Dulce germen, eos video curis
Confici omni tempore,
Primum quidem, quo pacto bene ipſos educent.
Et unde victum *relinquant liberis.*

And in Iphigenia in Aulide. v. 917.

Res eſt vehemens parere, & adfert ingens deſiderium :
Communeque omnibus eſt, ut laborent pro liberis.

Sect. CCLXXXV.

Tranſition to ſucceſſion by will, and to inteſtates.

Since therefore every one has a right to transfer his goods to others, and that alienation may be made upon any conditions (§ 267); the conſequence is, that it may be made upon this condition, that another may obtain, after the alienator's death, the dominion and poſſeſſion of a thing. Now, ſince this will may be truly declared, or can be certainly inferred from the intention of the acquirer; and ſince, in neither of theſe caſes, the real and expreſs acceptance of the other perſon to whom the transference is made, is neceſſary (§ 284); the former comes under the name of *ſucceſſion to a laſt-will or teſtament*; and the latter is the genuine foundation of *ſucceſſion to a perſon who dies inteſtate.*

CHAP. XI.

Of derivative acquiſitions by ſucceſſion to laſt-will and to inteſtates.

Sect. CCLXXXVI.

How a teſtament is defined by the Roman lawyers.

A *Teſtament*, in the notion of Civilians, is a ſolemn declaration of one's will concerning the tranſition of his inheritance and all his rights to another after his demiſe. And therefore, while the teſtator is alive, no right paſſes to his heirs; nay, not ſo much as any certain hopes of which they may not be fruſtrated; but the teſtator, while he lives, may alter his intention, and tearing or deſtroying his former will, make a new diſpoſition, or die without a will *.

* Hence theſe known maxims of law, That the will of a teſtator is ambulatory till his death: That the laſt will alone is valid, being confirmed by death; or as Quintilian, Declam. 37. expreſſes it, "That teſtament alone is valid after which there can be no other," and ſeveral other ſuch; yea, ſo far does this liberty with regard to teſtaments extend, that it is ſaid none can deprive himſelf of the liberty of changing by any clauſe of renunciation, nor even by confirming his former teſtaments with an oath, l. ult. D. leg. 2. Grotius de jure belli & pacis, 2. 13. 19. Leyſer. medit. ad Pand. ſpec. 43. n. 6. & 7.

Sect. CCLXXXVII.

Such a teſtament is not of the law of nature. Firſt argument.

But that ſuch a teſtament is not known to the law of nature is evident. For tho' right reaſon eaſily admits that ſolemnities ſhould be added to ſo ſerious an action, which is obnoxious to ſo many frauds; yet it implies a contradiction, to ſuppoſe a perſon to will when he cannot will, and to deſire his dominion to paſs to another, then, when he himſelf has no longer any dominion. This is ſo abſurd, that the Romans owned the contradiction could not be removed but by mere fictions *.

* For ſince a teſtator neither tranſacts any affair with his heir when he diſpoſes of his effects, nor the heir with the teſtator, when he acquires; and therefore, in neither caſe does any right paſs from the one to the other; many things were feigned by lawyers, always very ingenious in this reſpect, to reconcile theſe inconſiſtencies. Hence they feigned the moment of teſtament-making to be the ſame with the very inſtant of dying, and the inſtant of death to be the ſame with the moment of entering upon a ſucceſſion,

bringing it back by fiction to the inſtant of death, l. 1. C. de 55. eccl. l. 54. D. de adqu. vel amitt. hered. l. 193. D. de reg. jur. Beſides, they feigned the inheritance not entered upon to be no perſon's, but to repreſent the perſon of the deceaſed, § 2. Inſt. de hered. inſt. l. 31. § ult. D. eod. l. 34. D. de adqu. rer. dom. Ant. Dadin. Alteſerra de Fict. jur. tract. 4. 2. p. 143. Jo. Gottfr. a Coccei. de teſtam. princip. part. 1. § 24.

Sect. CCLXXXVIII.

Another argument.

Add to this, that no reaſon can be imagined why the ſurvivers ſhould hold the will of the defunct for a law, eſpecially when it very little concerns one, whatever his condition be, after death, whether Dion or Thion enjoys his goods*: yea, the laſt judgments of dying perſons often proceed rather from hatred and envy than from true benevolence; and in ſuch caſes, it ſeems rather to be the intereſt of the deceaſed that his will ſhould not take effect, than that his ſurvivers ſhould religiouſly fulfil it. See our diſſertation de teſtam. jure Germ. arct. limit. circumſcript. §. 5.

* Hence Seneca of Benefits, 4. 11. ſays very elegantly "There is nothing we ſettle with ſuch religious ſolemn care as that which nowiſe concerns us." As this very grave author denies that theſe laſt judgments belong to men; ſo in the ſame ſenſe Quintilian Declam. 308, calls them a will beyond death. Since therefore the Civilians do not allow even a living perſon to ſtipulate, unleſs it be the intereſt of the perſon ſtipulating, § 4. Inſtit. de inut. ſtip. how, pray, can the ſame Roman lawyers before the validity of the wills of deceaſed perſons, when it is not for their intereſt? We readily grant that the ſouls of men are immortal, (which we find urged by the celebrated Leibnitz, nov. method. juriſp. p. 56.) but hence it does not follow, that ſouls delivered from the chains of the body retain the dominion of things formerly belonging to them, much leſs that they ſhould be affected with any concern about them.

Id cinerem & Manes credis curare ſepultos?
Virg. Æn. 4. v. 92.

Sect. CCLXXXIX.

What with regard to the teſtaments in other nations.

Since therefore the law of nature ſcarcely approves of teſtament-making, as deſcribed by the Roman laws, *i. e.* as Ulpian elegantly defines it, tit. 20. " A declaration of our mind ſolemnly made to this end, that it may take place validly after our deceaſe," (§ 286) ; the conſequence is, 1. That it no more approves like cuſtoms of other nations ; and therefore, 2. That teſtaments of the ſame kind among Greeks or Barbarians, are no more of the law of nature and nations than thoſe * of the Romans ; and for the ſame reaſon, 3. No nation hath accommodated their manners in this reſpect more to the ſimplicity of the law of nature than the Germans where there was no teſtament ; (*heredes ſucceſſoreſque ſui cuique liberi, & nullum teſtamentum* ; Tacitus de mor. Germ. c. 20.)

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* We find, from the time of Solon among the Athenians, a ſimilar kind of teſtament, conſiſting in will on one ſide, with regard to what ought to be done after death, Plutarch. in Solone, p. 90. and among the Lacedemonians from the times of the Ephor Epitadeus. Plut. in Ægid. & Cleom. p. 797, and among other Greeks, who all agreed, in this matter, in the ſame practice, as Iſocrates tells us, in Æginet. p. 778. There are likewiſe examples of ſuch teſtaments among the Egyptians, as of Ptolomy in Cæſar de bello civil. 3. 20. Hirt. de bello Alex. cap. 5. Attalus King of Pergamos, in Florus, Hiſt. 2. 20. Hiero of Sicily, of whom Livy, 24. 4. and finally among the Hebrews themſelves, of whoſe way of making wills, ſee Selden de ſucceſſ. ad leg. Heb. cap. 24. But that it was not of ancient uſage among them, and that it owed its riſe to the interpretations of their doctors, may be proved, amongſt other arguments, by this conſideration, that there is not a word in their language for a teſtament, and therefore they gave it a Greek name. See our Diſſertation de teſtamentif. jure Germ. arct. limit. circumſcript. § 6.

Sect. CCXC.

What with regard to Grotius's definition.

This being the caſe, Grotius gave a new definition of a *teſtament*, (of the rights of war and peace, 2. 6. §. ult.) he defines it thus; "Alienation to take place at the event of death, before that revocable, with retention of the right of uſe and poſſeſſion." But as this definition does not quadrate with what we commonly call *teſtament*, and is faulty in ſeveral reſpects; (Ziegler. ad Grotium, 2. 6. Pufend. de jure nat. & gent. 4. 10. 2. and the illuſtrious Jo. Gottfr. de Coccei. ibid. §. 4. & ſeq.) ſo it does not follow that teſtament-making is of the law of nature, becauſe that law does not diſallow of alienation at the event of death, revocable before that event, with retention of the right of poſſeſſing and uſing.

Sect. CCXCI.

What diſpoſition with regard to ſucceſſion after death is lawful by the law of nature.

But tho' the arguments above-mentioned plainly ſhew, that teſtament-making, according to the Roman law, is not of the law of nature, yet they are by no means repugnant to all diſpoſitions with reſpect to future ſucceſſion (§ 268) *. Let us therefore enquire what theſe are which are approved by the law of nature. And I anſwer, they are nothing elſe but pacts, by which dying perſons transfer a poſſeſſion itſelf, with the dominion to others; or men in good health give others the right of ſucceeding to them at the event of their death. For ſince we can diſpoſe of our own, not only for the preſent, but for the future (§ 268), we may certainly make a pact for transferring to another what belongs to us, either to take place at preſent, or at our death *.

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* And in the earlieſt ages of the world men diſpoſed of their goods in no other way than this. So Abraham, having no children, had deſtined his poſſeſſions to his ſteward Eleaſar, Gen. xv. 3. no doubt, by ſome ſucceſſory, pact, or donation to take place at his death. The ſame Abra-

ham, his wife Sarah being dead, having children by Kethura, diſtributed, while he was in health, part of his goods by donation, and gave the reſidue to Iſaac, Gen. xxv. 5, 6. Thus Cyrus alſo at his death, in the preſence of Cambyſes, gave his eldeſt Son the kingdom, and to the younger the lordſhips of the Medes, the Armenians and Caduſians, Xenoph. Cycrop. 8. 7. 3. Mention is made of a diviſion and donation made by parents amongſt their children upon the approach of death, Gen. xlviii. 22. Deut. xxi. 16, 17. 1 Kings, i. 35. Syrac. xxxiii. 24. and examples of it among the Francs are quoted by Marculf. Form. 1. 12. 2. 7.

Sect. CCXCII.

What ſucceſſory pacts are valid.

Since every one therefore hath a right to transfer his goods for the preſent or for the future, at the event of his death (§ 291); the conſequence is, that there is no reaſon why pacts about ſucceſſion may not be pronounced agreeable to the law of nature *. But, on the contrary, they ought to be deemed valid by the beſt right, whether they be reciprocal, or obligatory on one ſide only; and whether they be acquiſitive, preſervative, or remunerative; for as to diſpoſitive pacts, that they bind the contracters, but not him whoſe heritage is diſpoſed of, is evident, becauſe he hath made no pact about his own.

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* The Roman law does not approve of them, but pronounces them contrary to good manners, and liable to very fatal conſequences, l. ult. c. de pact. But the objections taken from the deſire of one's death, that may thus be occaſioned, do not lie ſtronger againſt ſuch compacts than againſt donations in view of death, which are valid by the Roman law. Nor are thoſe ſad effects which Rome once ſuffered by legacy-hunters, an argument of any repugnancy between ſuch pacts relative to ſucceſſion after death and honeſty, becauſe neither teſtament nor any other human inſtitution, is proof againſt the abuſe of wicked men.

Sect. CCXCIII.

How one may diſpoſe of his inheritance.

Beſides, ſince ſuch is the nature of all transfers of property, that any one may except or ſecure to himſelf any part of, or any right in his own he pleaſes, in which caſe, ſo much only is tranſmitted as the owner willed to tranſmit (§ 279); it is evident, that it is at the option of the owner to transfer the poſſeſſion to his heir by pact at once; or the right only of ſucceeding to his eſtate after his death; to transfer either revocably or irrevocably *; with or without any condition; in whole or in part; ſo that there is no natural oppoſition between teſtate and inteſtate, as Pomponius ſeems to have imagined, l. 7. D. de reg. juris.

* Thus Abraham transferred an irrevocable right to his Sons by Kethura. And Telemachus in Homer's Odyſſ. B. 17. v. 77. transferred a revocable one to Piræus,

We know not yet the full event of all:
Stabb'd in his palace, if your prince muſt fall,
Us, and our houſe, if treaſon muſt o'erthrow,
Better a friend poſſeſs them than a foe:
Till then retain the gifts.

Sect. CCXCIV.

Whether an heir be obliged to accept of the heritage deſtined for him.

But becauſe a thing may be accepted, not only actually but preſumptively, when from the nature of the thing it cannot but be concluded, that one will not refuſe what another deſigns to transfer to him (§ 284); it muſt therefore be the ſame in effect by the law of nature, whether one be preſent and declares his conſent, or being abſent, ſo that he cannot accept verbally, there is no ground to apprehend that the liberality of another will be diſagreeable to him *; eſpecially, if the inheritance deſigned for him be very profitable. There is however this difference between theſe caſes, that in the former the heir acquires a valid and irrevocable right, unleſs the owner hath expreſly reſerved to himſelf the faculty of revoking; whereas in the latter, there is liberty to revoke till acceptation be made: And whereas an heir having declared his conſent, cannot renounce the heritage he hath accepted, he whoſe conſent is preſumed, may enter upon or refuſe the heritage transferred to him, as he thinks proper.

* This whole matter is admirably illuſtrated by the chancellor of our college, my beloved collegue Jo. Petrus a Ludewig, in a diſſertation wrote with great judgment and erudition, de differentiis juris Romani & Germanici in donationibus, & barbari adnexus, acceptatione. Hal. 1721, where he hath ſhewn by impregnable examples and arguments, that neither the nature of donation, nor the Juſtinian, nor the Canon, nor the German law, requires acceptation made by words or other ſigns, and hath ſolidly refuted all objections.

Sect. CCXCV.

The foundation of ſucceſſion to one who dies inteſtate.

But if an owner can really and truly will that his goods may be transferred to one after his death (§ 291), there is no reaſon why as much ſhould not be attributed to one's will, preſumed from his end and intention, as to one's will expreſſed by words or ſigns (§ 268). Now we have already ſhewn, that it is not the end and intention of thoſe who acquire any thing, and take care of their acquiſitions, that they ſhould after their death be held for things relinquiſhed to the firſt occupant; but that they ſhould be advantageous to thoſe whom they love and wiſh well to (§ 284). But hence we may juſtly conclude the ſucceſſion to belong to them, preferably to all others, for whoſe ſake chiefly the defunct acquired and took care of his acquiſitions with ſo much concern and ſollicitude *.

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* This is ſo true, that nothing ordinarily is ſo vexatious and tormenting to men as the thoughts of their eſtate's fal-

ling to men they hate, after their death, and when, as the Poet has it,

Stet domo capta cupidus ſuperſtes,
Imminens lethi ſpoliis, & ipſum
Computet ignem.

Nothing is more certain than what Pindar ſays in a paſſage quoted by Pufendorff on this ſubject (of the law of nature and nations, 4. 11. 1.) " Riches which are to fall into the hands of a ſtranger, are odious to the dying perſon.

Sect. CCXCVI.

But becauſe this is not a duty of perfect obligation, but rather a ſpecies of humanity, which pays regard to perſons and ties or connexions, and therefore prefers relatives to ſtrangers (§ 220); hence we have reaſon to infer, that relatives exclude all ſtrangers from ſucceſſion, and that among relatives thoſe of the nearer degrees are preferable; and that many of the ſame line and degree have equal rights to ſucceſſion *.

Axioms relating to it.

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* For tho' it be not always true, that kindred are dearer to one than ſtrangers: yea, ſo far is it from it, that love amongſt brothers is very rare: yet ſince, if the defunct had been of that opinion, nothing hindered him to have diſpoſed of his eſtate as he pleaſed, and to have left it to whom he liked beſt (§ 291); and he choſe rather to die without making ſuch a diſpoſition; he cannot but be judged not to have envied the inheritance of his goods to his relatives, whom natural affection itſelf ſeems of choice to call to the ſucceſſion. But one is nearer, not only in reſpect of degree, but likewiſe in reſpect of line. For Ariſtotle hath juſtly obſerved, that natural affection falls by nature upon the deſcending line, and failing that upon the aſcending line, and failing both theſe upon the collateral, Nicomach. 8. 12. Hence Grandchildren, tho' in the ſecond degree, are nearer than a parent, and a great grandfather, tho' in the fourth degree, is nearer than a brother, *&c.*

Sect. CCXCVII.

The ſucceſſion of children.

Since of relatives the more remote are excluded by the nearer (§ 296), but none can be reckoned nearer to one than children are to their parents; therefore they are juſtly preferred in ſucceſſion to their parents before all others, and that without diſtinction of ſex or age *: For as to the preference given in ſome countries to males, and to the firſt-born, that, becauſe it is making an unequal diviſion among equals, proceeds from civil law, pact, or ſome other diſpoſition; and ſo it is not of the law of nature (§ 271).

* But if the thing be indiviſible, there is no doubt it may (ceteris paribus) be left to the firſt-born, on condition that he make ſatisfaction to the reſt (§ 270). The firſt-born are wont to have a ſpecial prerogative, if the heritage be indiviſible; eſpecially if it be a crown or ſovereignty. Cyrus in Xenophon ſays elegantly, " This alſo I muſt now declare to you, even to whom I leave my kingdom, leſt that being left doubtful, ſhould occaſion diſquiets. I love you, my ſons, both with equal affection: But I order that the eldeſt ſhould govern by his prudence, and do the duty of a general, when there ſhall be uſe or occaſion for it, and that he ſhould have, in a certain ſuitable proportion, the larger and ſuperior uſe of my demeſnes." Tho' the affections of kings be equal towards all their children; yet the nature of government itſelf ſeems to require, that ſons ſhould be preferred in ſucceſſion to ſovereignty to daughters, and amongſt them the eldeſt to the younger, inſomuch that it is become, as Herodotus ſays, a received law in all nations, l. 7. p. 242. and what is done againſt this rule, is, according to the ancients, againſt the law of nations. See Juſtin. Hiſt. 12. 2. 24. 3. Liv. 40. 9.

Sect. CCXCVIII.

Legitimate children only ſucceed to the father,

But if in ſucceſſion to parents children be juſtly preferable to all others (§ 297), and this may be concluded from the preſumed will of parents, (§ 295); the conſequence is, that it ought to be certainly known who is the child. But becauſe that cannot be aſcertained except in the caſe of lawful marriage; hence we infer, that legitimate children only, even poſthumous ones, and not illegitimate ones, or baſtards, ſucceed to a father; but that all children ſucceed promiſcuouſly to a mother; tho' none will deny that a father may take care of his illegitimate children in his diſpoſition.

but to the mother even illegitimate children ſucceed.

Sect. CCXCIX.

How grandchildren ſucceed.

Beſides, it may be inferred from the ſame will of parents (§ 295), that the ſucceſſion of deſcendents extends not only to children of the neareſt, but of the more remote degrees; and therefore that grandſons and grandaughters are admitted to inherit, as well as ſons and daughters; and that not only if there be no children of the firſt degree, but if they concur with them; ſo that the right of repreſentation, by which children of the remoter degrees ſucceed into the room of their parents, and receive their portion, is moſt agreeable to the law of nature.

* And this is the foundation of the ſucceſſion of children of the firſt degree, *in capita*, by heads, and thoſe of remoter degrees, *in ſtirpes*, by deſcent. That this is conſonant to the law of nature appears even from hence, that if contrariwiſe, all ſhould ſucceed *in capita*, the condition of the ſurviving children would be rendered worſe by the death of a brother or ſiſter, and the condition of grandchildren would be bettered by the death of their parents, and ſo there would be no equality among them. For if the father were worth a hundred pieces, and had four children, each would get twenty five pieces. Now ſuppoſe one of the four, contrary to the courſe of nature, to have died before the father, leaving ſeven grandchildren to him: in that caſe, if all ſucceeded *in capita*, each would get ten pieces; and thus by the brother's death, the three children of the firſt degree would have loſt forty five pieces, and the ſeven grandchildren would have gained as much by the untimely death of their father. But ſince no reaſon can be

aſſigned why the death of a brother ſhould diminiſh the patrimony of the ſurviving brothers or ſiſters, and add to that of the grandchildren; no reaſon can be given why both ſhould be admitted to ſucceſſion equally *in capita*.

Sect. CCC.

What if none other exiſt?

From the ſame rule, that the neareſt of many relatives are to be preferred (§ 296), it follows, that grandchildren are to be preferred both to the parents of the grandfather, tho' nearer in degree, and to his brothers and ſiſters, tho' equal in degree. For one is to be judged nearer, not only in reſpect of degree, but chiefly in regard to line (§ 296) *. But whether natural equity in this caſe calls grandchildren to ſucceſſion by heads, or by deſcent, may be eaſily underſtood from what hath been ſaid in the preceding ſcholium.

* For no reaſon can be brought, why the condition of one iſſue ſhould be bettered and another worſted by the untimely death of parents; which muſt however be the caſe, if the grandchildren ſurviving their parent ſhould be admitted by heads: Becauſe, ſuppoſe a man worth a hundred pieces to have four ſons, and to have by the firſt, one, by the ſecond, two, by the third, three, and by the fourth, four grandchildren alive; if the ſons had ſurvived they would have received each twenty five pieces, and have conſequently tranſmitted each to his children as much. But if they dying, the grandchildren be admitted to ſucceſſion by heads, each would get ten pieces, and thus the one grandchild by the firſt ſon would loſe fifteen pieces, the two by the ſecond five, and the three by the third would gain five, and the four by the fourth would gain fifteen. But if this be unreaſonable, it muſt be unreaſonable to admit grandchildren in this caſe to ſucceſſion by heads.

Sect. CCCI.

Succeſſion in the aſcendent line.

Since, failing the line of deſcendents, the neareſt is the aſcendent (§ 296), hence it is plain, that the mournful ſucceſſion to their children is due to the progenitors *, and in ſuch a manner, that the nearer in degree excludes the more remote, and thoſe of the ſame degree come in equally. Nor does the law of nature in this caſe ſuggeſt any reaſon why the inheritance of children ſhould be divided among many of the ſame degree according to lines; ſo that theſe, and like caſes, muſt rather be left to the determination of civil laws.

* This is ſo agreeable to right reaſon, that whereas the divine law eſtabliſhed this order of inheritance, that the ſons ſhould ſtand firſt, the daughters next, then the brothers, and in the fourth place the uncles by the father's ſide, Num. xxvii. 8. & ſeq. Philo remarks, that ſomething ought here to be ſupplied by right reaſon. "For it would be fooliſh (ſays he) to imagine, that the uncle ſhould be allowed to ſucceed his brother's ſon, as a near kinſman to the father, and yet the father himſelf be abridged of that privilege. But in as much as the law of nature appoints (*where by the law of nature Philo undoubtedly underſtands the order of nature*) that children ſhould be heirs to their parents, and not parents to their children, Moſes paſſed this caſe over in ſilence as ominous and unlucky, and contrary to all pious wiſhes and deſires, leſt the father and mother ſhould ſeem to be gainers by the immature death of their children, who ought to be affected with moſt inexpreſſible grief: Yet by allowing the right of inheritance to the uncles, he obliquely admits the claim of the parents, both for the preſervation of decency and order, and for the continuing the eſtate in the ſame family." Nor do the Talmudiſts reaſon otherwiſe about ſucceſſion in the aſcendent line. See Selden de ſucceſſ. in bona def. ad leges Hebr. cap. 12. where this matter is fully and accurately handled.

Sect. CCCII.

Succeſſion of collaterals.

It follows from the ſame principle (§ 296), that failing both the aſcending and deſcending line, the ſucceſſion to inteſtates devolves on the collateral kindred, according to the degree of nearneſs in which they ſtand; nor is there any reaſon why the *right of repreſentation* ſhould take place among collaterals *; much leſs is there any reaſon why duplicity of ties, or the origine of the goods ſhould make any difference. In this caſe, many of the ſame degree equally divide the inheritance: nor is there any difference how far they may be removed from the defunct, ſeeing it was in his power to appoint another heir, if he had no mind they ſhould be made happy by his eſtate.

* For ſince ſucceſſion belongs preferably to thoſe for whom the defunct chiefly acquired and managed with care (§ 295), and experience ſhews us, that affection is commonly no leſs ardent towards the remoter than the nearer deſcendents: Hence it is juſtly concluded, that grandfathers had no inclination to take from their grandchildren what was due to their parents; and on account of this preſumed inclination or will, they ought to ſucceed to the rights of their parents. On the other hand, the ſame experience teaches us, that with reſpect to collaterals, affection diminiſhes every remove, and therefore it does not follow that a brother's ſon, *e. g.* ſhould come into the ſame place with the uncle as his brother. Hence there is no reaſon why a brother's ſon ſhould concur with brothers in ſucceſſion.

Sect. CCCIII.

Much is here left to civil legiſlators.

So far does right reaſon acknowledge the right of ſucceſſion in kindred. But becauſe it is obvious to every one, that all theſe things belong rather to the permiſſive than to the preceptive part of the law of nature, much muſt here be left to civil legiſlature, to fix and determine by their laws, as the end and intereſt of their ſtates may require (§ 18.) And hence it is eaſy to give a good reaſon why legiſlators have thought the ſurviving wife ſhould be taken care of; and why there is no branch of law almoſt in which civil laws and ſtatutes ſo much differ, as with regard to ſucceſſion to inteſtates.

Sect. CCCIV.

Whether any heirs be neceſſary?

Seeing this whole right of ſucceſſion proceeds from preſumed will (§ 285); but he, whoſe conſent is preſumed, may enter upon an inheritance, or renounce it as he pleaſes (§ 294), it muſt be evident to every one, that *neceſſary* heirs are unknown to the law of nature *. And therefore that no perſon is heir to an inteſtate by unalterable right, but becomes ſuch by his conſent, declared by words or deeds.

Sect. CCCV.

How heirs ſucceed to the rights and obligations of the deceaſed.

Now, when one determines to ſucceed to another, nothing is more equal, than that he ſhould be adjudged to ſucceed to all his rights and burdens (§ 267); whence it follows, that an heir, whether by the real diſpoſition of the deceaſed, or by his preſumed will, acquires all his rights, which are not extinguiſhed by his death; and that he has no reaſon to complain, if he be bound to ſatisfy all his obligations, as far as the inheritance is ſufficient *.

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* That reaſon is quite a ſtranger to heirs neceſſary, voluntary and extraneous, is plain, becauſe it knows nothing of the reaſon lawyers had in their view in making ſuch diſtinctions. Firſt of all, this quality and difference of heirs belongs chiefly to teſtamentary heirs, to which, as we have already obſerved, the law of nature is a ſtranger (§ 287), becauſe to one who dies inteſtate, no ſervant ſucceeds as neceſſary heir. Again, a teſtament among the Romans was a ſort of private law. And they thought a teſtator could indeed give law to his ſervants and children, whoſe duty and glory it was to obey their will, but not to ſtrangers not ſubject to their power. Hence they called thoſe *neceſſary* and theſe *voluntary* heirs, (Elem. ſec. ord. Inſt. § 95.) But ſince the law of nature knows nothing of all this, it cannot poſſibly know any thing of this difference with reſpect to heirs.

* Not therefore, *in ſolidum*, in whole. For ſince there is no other reaſon why an heir is obliged to fulfil what the defunct was bound to do by buying or hiring, and to pay his debts, but becauſe he hath acquired his goods, no reaſon can be imagined why he ſhould be bound farther then the inheritance is ſufficient to anſwer. Beſides that

rigour of the Roman law, by which an heir ſucceeded to all the obligations of the defunct, turns upon a fiction, that the heir and the defunct are the ſame perſon, l. 22. D. de uſucap. l. 14. C. de uſufr. Novell. 48. præf. Ant. Dadin. Alteſerra de fiction. jur. tractat. 1. cap. 20. p. 48. Now ſince the law of nature knows no ſuch fiction, it cannot know that which follows from it alone.

CHAP. XII.

Concerning the rights and duties which ariſe from property or dominion.

Sect. CCCVI.

A threefold effect of dominion.

Dominion is the right of excluding all others from the uſe of ſomething (§ 231). But when we exclude others from the uſe of a thing, we pretend to have the ſole right of uſing it. Hence the firſt effect of dominion is the *free diſpoſal* of a thing; *i. e.* the right or faculty of granting any one the uſe of it; nay, of abuſing it, and of alienating it at his pleaſure. Again, from what we can juſtly exclude others, that we retain to ourſelves with that intention, and therefore *poſſeſſion* is amongſt the effects of dominion. Finally, we alſo exclude others from the uſe of a thing, when, being in another's poſſeſſion, we reclaim it. But to reclaim a thing in another's poſſeſſion, being to endeavour to *recover* it, it follows, that one of the nobleſt effects of dominion is the right of *recovering* our own from whomſoever poſſeſſing it.

* All theſe effects of dominion are acknowledged by the Roman law. For what is ſaid by Caius, l. 2. D. ſi a par. quis man. "That it is unjuſt for men not to have the liberty of alienating their goods," it is to be underſtood of free diſpoſal. In like manner Paullus infers, from the right of poſſeſſion belonging to the lord or maſter only, l. 3. § 5. D. de adqu. vel amitt. poſſeſſ. "That many cannot

poſſeſs the ſame thing in whole; and that it is contrary to nature that you ſhould poſſeſs what I poſſeſs. That two can no more poſſeſs the ſame thing, than you ſhould occupy the ſame place in which I am." All belonging to the reclaiming of a thing, which is the principal action ariſing from dominion, is well known. Hence it is among the paradoxical themes of diſpute, " That the lord of timber cannot recover it, if it be joined, § 29. Inſt. de rer. diviſ.

Sect. CCCVII.

Hence the owner has the right to uſe the profits.

Since therefore the owner has a right to *apply* his own to any uſe whatſoever (§ 306), the conſequence is, that he has a right to enjoy all the profits ariſing from the thing itſelf, and from its acceſſions and increments, as far as theſe can be acquired by the proprietor (§ 250); and therefore to reap all the fruits, and either to conſume or ſhare them with others, or to transfer them to others upon whatſoever account. Nay, becauſe the yearly fruits and profits of things may be increaſed by art and careful management, nothing hinders a maſter from altering the thing, and ſo rendering it more profitable, provided he do not by ſo doing deprive another of his right.

* This right belongs to the maſter only, as is plain when we conſider the right of uſufruct, of uſe, of loan, of hire, all which, becauſe they are exercod about a thing belonging to another, do not include the right of changing a thing at pleaſure, tho' all of them include the right of reaping the fruits. Therefore the right of taking the profits may be common to the maſter with others, but the faculty of changing the thing, *i. e.* the principal or ſubſtance, is proper to the maſter only, nor can he who has the right of uſe, uſufruct, loan or hire, claim it without his permiſſion.

Sect. CCCVIII.

As likewiſe of corrupting or ſpoiling it.

Since he hath likewiſe the right of abuſing (§ 256), *i. e.* of conſuming, or of deſtroying the thing and its fruits, Donat. ad Terent. Andr.

prolog. v. 5. the conſequence is, that the maſter may deſtroy the thing which is his own, provided he do it not with that intention that another may thereby receive detriment *. For tho' ſuch a ſpoiling of our own goods, which may be beneficial to others, be repugnant to the love of humanity (§ 217); yet he does not violate expletive juſtice, who, in conſequence of his having dominion, abuſes his own, and without any neceſſity urging him ſo to do, corrupts it.

Sect. CCCIX.

As likewiſe of alienating them.

Becauſe the free power or right of a maſter to diſpoſe of his own comprehends likewiſe the right of alienation (§ 306), it may eaſily be underſtood, that an owner can abdicate his dominion, and transfer it to another, either now, or for a time to come, and grant any other advantage by it, or right in it, to any perſon; and therefore give it in uſe, uſufruct, mortgage, pledge, as he will, provided no law, no pact, no other more valid diſpoſition ſtand in his way.

Sect. CCCX.

Since poſſeſſion alſo is one of the effects of dominion (§ 306), it is plain that the owner can take poſſeſſion of what belongs to him, and defend his poſſeſſion againſt every one, even by force; and that it makes no difference whether one poſſeſſes by himſelf or by another; yea, that poſſeſſion once acquired,

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* For if any corrupts his own with an intention to hurt another, he does it with a deſign to injure another, and by doing hurt to him, really injures another. But it being the firſt and chief principle of natural law, not to hurt any one (§ 178), the conſequence is, that he acts contrary to the law of nature who ſpoils his own goods with ſuch an intention. And to this claſs belongs the wickedneſs of thoſe who poiſon their flowers to deſtroy their neighbour's bees, Quinct. Declam. 13.

acquired, may be retained by an abſent perſon, and by will merely, while another hath not ſeized it *.

* For poſſeſſion is the retention of a thing, from the uſe of which we have determined to exclude others (231). As long therefore as we have determined to exclude others from the uſe of a thing, ſo long we have not relinquiſhed it (§ 241): Wherefore, ſuch a thing is not without a maſter, and none has a right to ſeize it. But what none hath a right to ſeize, I certainly retain the poſſeſſion of, even tho' at diſtance, by my will merely.

Sect. CCCXI.

The right alſo of recovering it.

Finally, the right of *recovering* a thing being among the effects of dominion (§ 306), it cannot but be that we may uſe our right againſt any poſſeſſor of what is ours; nor does it make any difference as to the reſtitution, whether one detain what is ours from us honeſtly or fraudulently; nor whether he be known to us or a ſtranger; becauſe we do not reclaim the thing on account of any deed of his; but becauſe we have a right to it. Beſides, ſince to reclaim and recover a thing is not the ſame as to redeem it; it is manifeſt, that when an owner recovers his own, he is not bound to reſtore the price; tho' equity doth not permit that one ſhould be inriched at another's expence (§ 257), or that he ſhould refuſe the neceſſary and uſeful expences laid out upon a thing by the poſſeſſor *.

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* To which caſe, without all doubt, belong the expences, without which the maſter himſelf could not have recovered his own from robbers, eſpecially if the poſſeſſor redeemed it with intention to have it reſtored to its owner, Pufend. law of nature, *&c.* 4. 12. 13. at which paragraph Hertius in his notes has brought an excellent example from Famian. Strada's Decades de bello belgico, l. 7. ad annum 1572. " When the merchants of Antwerp had redeemed merchandize of above a hundred thouſand pieces in value, from a Spaniſh ſoldier, who had plundered the city of Mechlin, for twenty thouſand, the

owners got them back, upon reſtoring that ſum, becauſe they could not have recovered the goods with leſs expence."

Sect. CCCXII.

How far he may recover the acceſſions and fruits.

Since the owner can claim to himſelf all the acceſſions and fruits of his own goods (§ 307), it may be enquired, whether an honeſt poſſeſſor be obliged to reſtore to the owner reclaiming his own, all the acceſſions, and all the fruits, nay, all the gain he hath received from another's goods? We conceive thus of the matter in a few words. He who honeſtly, and with a juſt title, poſſeſſes a thing, as long as the true owner is not known, has the right of excluding all perſons from the uſe of what he poſſeſſes. But he who has this right is in the room of the owner (§231), and therefore enjoys all the ſame rights as the owner; yet, becauſe he is not the true maſter who poſſeſſes a thing honeſtly, there is no reaſon why he ſhould deſire to be inriched to the loſs of the true owner; as there is none, on the other hand, why the maſter ſhould claim to himſelf the fruits not exiſting, which were not owing to his care and induſtry *.

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* For a natural acceſſion to a thing, the maſter of which is not known (§ 241), belongs to none, and ſo goes to the firſt occupant. Since therefore the honeſt poſſeſſor has ſeized the fruits which he produced by his own care and induſtry, there is no reaſon why they ſhould be taken from him. And therefore the Juſtinian law not abſurdly ſays, "That it is agreeable to natural equity and reaſon, that the fruits which an honeſt poſſeſſor hath gathered, ſhould be his for his care and labour." Nor is the caſe different with regard to civil fruits. For they, in like manner, when they are received having no certain maſter, and the true maſter of the ſubſtance producing them, having had no trouble about, belong alſo to an honeſt poſſeſſor, ſo long as the true maſter does not appear.

Sect. CCCXIII.

The acceſſions and the fruits belong to the maſter.

Becauſe neither ought to be inriched at the other's loſs (§ 312), the conſequence is, that even the acceſſions ought to be reſtored to the maſter reclaiming his own thing, and therefore he hath a right to demand the exiſting and hanging fruits *, the expences laid out upon them being deducted; becauſe the maſter would be inriched to the detriment of the honeſt poſſeſſor, if he ſhould take to himſelf the fruits upon which he had beſtowed no care.

* This Grotius grants (of the right of war and peace, 2. 8. 23. and 2. 10. 4.) but only with reſpect to natural fruits. But ſince even the induſtrial fruits are acceſſions to the principal of an owner, who is now known, no reaſon can be imagined why an honeſt poſſeſſor ſhould claim them to himſelf. But the maſter can by no means refuſe to repay expences, becauſe he would otherwiſe demand fruits which he did not produce by his care and induſtry (§ 312). Whence the Hebrews thus proverbially deſcribed a hard auſtere man, " One who reaps where he did not ſow, and gathers where he did not ſtraw, Mat. xxv. 24. Luke xix. 21.

Sect. CCCXIV.

The fruits gathered and conſumed to the poſſeſſor.

But ſince a natural acceſſion to a thing, the owner of which is not known, goes to the firſt occupant as a thing belonging to no body, the ſame is to be ſaid of the civil fruits (§ 212); conſequently, the fruits gathered ought to be left to an honeſt poſſeſſor, who beſtowed his labour and care about them, unleſs he be made richer by them * (§ 212.)

* The Civilians follow this principle in demanding an inheritance, l. 25. § 11. & § 15. l. 36. § 4. l. 40. § 1. D. de hered. petit. But in reclaiming a thing, they adjudge indiſcriminately the reaped fruits to an honeſt poſſeſſor, and make no account of the matter, whether he be enriched by them or not, l. 4. § 2. D. fin. regund. l. 48. pr. D. de adqu. rer. dom. But the reaſon of this difference is merely civil, and not founded in natural law. For

in ſuing for heritage, as being an univerſal action, the price is deemed to ſucceed into the room of the thing, not in ſingular actions. But the law of nature does not make theſe diſtinctions; and therefore it is moſt equal that thoſe received fruits ſhould be indiſcriminately reſtored to the true owner, by which one is made richer. And that this is now the practice obſerved in courts, is obſerved by Stryk. Uſ. hod. Digeſt. 6. 1. 12.

Sect. CCCXV.

Whether an honeſt poſſeſſor be obliged to pay the value of a thing conſumed, periſhed, or alienated.

From the ſame rules, that an honeſt poſſeſſor is in the room of the owner, but yet cannot inrich himſelf at the detriment of another (§ 312); we infer, that he is no more obliged to make reſtitution to the owner, if he infraudulently conſumed the thing, than if it had periſhed in his poſſeſſion by chance; but that he is obliged, if he ſell the thing he acquired without paying any price, or a ſmall price, for a greater price, becauſe he would be richer at another's coſt, if he kept the profit to himſelf. On the other hand, this obligation ceaſes, if the owner hath already received the value of his thing from another; partly becauſe in this caſe an honeſt poſſeſſor is indeed made richer, but not at the coſt of the owner; and partly becauſe the owner has a right not to ſue for gain, but only for loſs.

Sect. CCCXVI.

What a fraudulent poſſeſſor is obliged to reſtore.

Becauſe all this belongs to honeſt poſſeſſors only; and, on the other hand, becauſe fraudulent poſſeſſors are neither in the room of the owner, nor have they the right of uſe, on this ſcore, that the owner is not known to them; and therefore none of theſe reaſons, why one may enjoy any advantage by a thing, or its fruits, takes place; hence it is plain, that they are ſtrictly bound not only to reſtore what is exiſting, but to refund the value of things conſumed or alienated; and much more, of all the fruits they have, or might have reaped from them, and likewiſe to run all riſks *.

* For tho' accidents be regularly imputable to no perſon (§ 106), yet this rule does not take place if it was the agent's fault that any accident happened (§ ibidem), becauſe then there is default as well as accident. Now, a fraudulent poſſeſſor could and ought to have reſtored the thing to its true owner, and if he had done it, he would have prevented its periſhing in his hands. He is therefore obliged to anſwer for all accidents; whence the Roman lawyers have rightly determined, that a thief and robber are anſwerable for all chances, becauſe they are always the cauſe why a thing is not in the poſſeſſion of its owner, *(quia ſemper in mora ſint)* l. 8. § 1. D. de condict. furt.

Sect. CCCXVII.

The effects of dominion are ſometimes reſtricted by civil laws.

Now theſe are the rights which ariſe plainly from dominion; but ſince it belongs to civil law to adjuſt indifferent actions to the intereſt of each people or ſtate (§ 18); and it is frequently the intereſt of a ſtate, that no member ſhould make a bad uſe of his goods (Inſtit. § 2. de his qui ſui vel alieni juris ſunt,) it is no wonder that dominion is ſometimes confined within narrower limits by governors of ſtates, and that ſometimes the liberty of diſpoſal, ſometimes the right of taking poſſeſſion, and ſometimes the right of recovering, is either wholly taken away from owners, or not allowed to them but under certain reſtrictions *.

* Thus we find the civil law taking the free diſpoſal of their goods from pupils, mad perſons, prodigals, minors. The ſame law does not allow a legatee, tho' owner of the thing left to him in legacy, to take poſſeſſion, and gives the heir a prohibition againſt him, if he goes to ſeize at his own hand. (Interdictum quod legatorum) tot. tit. D. quod legat. Again, it is known that he, whoſe timber another hath joined, tho' he be the owner of the materials, and doth not loſe his dominion, yet he cannot recover the timber when joined, by the laws of the twelve tables, § 29. Inſt. de rerum diviſ. l. 7. D. de adqu. rerum dom. So

that there is almoſt no effect of dominion which the civil laws ſuffer to remain always and wholly ſafe and entire, if the public good of the common-wealth require it ſhould not: For this magiſtrates juſtly account the ſupreme law in all thoſe matters, which belong to the permiſſive part of the law of nature. Becauſe, ſince any one by the law of nature may renounce his permiſſive rights (§ 13), a people may alſo renounce them, and hath actually renounced them by ſubmitting themſelves to the laws enacted by the ſupreme power under whoſe authority they have put themſelves.

Sect. CCCXVIII.

Sometimes by the pacts and diſpoſitions of the firſt owners.

And becauſe an owner has the liberty of diſpoſing of his goods in his life, or in the proſpect of death (§ 268), and then juſt as much is transferred to another, as he who alienates willed to transfer, (§ 279), it is plain the effects of dominion may be reſtricted by the pact and diſpoſition of the former owner *, and in this caſe the poſſeſſor can arrogate no more to himſelf than he received from the former owner, unleſs he in whoſe favour the reſtriction was made, voluntarily quit his right, ceaſe to exiſt, or loſe his right by a juſt cauſe.

* Thus ſometimes the right of reaping all advantage from a thing is circumſcribed within narrower limits by the diſpoſition of the former owner, as, *e. g.* if he hath given another the uſufruct, any right of ſervice, or hath pawned it (§ 282). Sometimes the liberty of diſpoſing, deſtroying, and alienating is taken from the maſter, as when the dominion or right of uſe merely is given him (§ 279); or when the thing is burdened with ſome fiduciary beqeuſt, &c. An uſufruct being conſtituted, even the right of poſſeſſion, which could not otherwiſe be refuſed to the owner, is reſtricted; as when the right of uſe is given to one, the direct or ſuperior lord has neither the right of poſſeſſing the thing, nor of claiming what appertains to the right of uſe.

Sect. CCCXIX.

A proprietor ought not to be hurt by any one in the uſe of his own.

Hitherto we have only treated of rights ariſing from dominion or property. Now ſince right and obligation are correlates, and therefore a right being conſtituted an obligation is conſtituted (§ 7); the conſequence is, that as many rights as dominion gives to an owner, juſt ſo many obligations does it lay others under with regard to the owner. Becauſe therefore an owner hath the liberty of diſpoſing (§ 306), they injure him who hinder him in diſpoſing or enjoying the fruits of his own *: They alſo do him damage who corrupt or ſpoil the fruits and acceſſions of his property. And in general, ſince he who intercepts or corrupts any thing that tends to the perfection or happineſs of another certainly wrongs him (§ 82), but none ought to be wronged (§ 178); hence we may juſtly conclude, that none ought to have his free diſpoſition of his own diſturbed or hindered; that none ought to have his goods damaged; and therefore, if any thing of that kind be done, the author of the injury is bound to make reparation, and is moreover liable to puniſhment.

Sect. CCCXX.

Nor directly nor indirectly

Seeing poſſeſſion belongs to the rights of property (§ 306), the conſequence is, that it is our duty to

ſuffer

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* For the Roman lawyers define *an injury* to be not only any wrong done to a perſon by words or deeds, but any action by which one is hindered from the uſe either of public things, or of what is his own, or by what one arrogates to himſelf any degree of liberty in diſpoſing of what belongs to another. Thus by the leg. Cornel. he is guilty of injury who enters another's houſe forcibly, l. 5. pr. D. de injur. he who hinders one to fiſh in the ſea, or to draw a drag-net, to bath in public baths, to ſit on a public theatre, or to act, ſit, or converſe in any other place, or who does not permit us to have the uſe of what is our own, l. 13. § 7. D. eod.

intercept or hinder his poſſeſſion.

ſuffer every one to poſſeſs his own quietly and unmoleſted, and not to deprive any one of his poſſeſſion againſt his will directly or indirectly. And that if any one can be proved to have done any ſuch thing, he is bound as an injurious perſon, to repair all the damage he has done, and is moreover liable to condign puniſhment.

Sect. CCCXXI.

It is done directly by theft, rapine and violent ejection.

One carries off another's poſſeſſion directly, either by open force, or by taking it away clandeſtinely. The latter is called *theft*. The former, if the thing be moveable, is called *rapine*; and if it be immoveable it is called *force*, or *violent ejection*. *Theft* is therefore taking away another's goods in a clandeſtine manner, without the knowledge and againſt the will of the owner, to make profit of them *. *Rapine* or *robbery* is bearing off a moveable thing by violence, againſt the owner's will, to make profit of it: And *force* is ejecting one violently out of his poſſeſſion of an immoveable thing.

* If a thing be carried away to affront one, or by way of contumely, it is called an *injury*; if it be carried away in order to ſpoil it, it is called *damage*. Thus in Homer, Iliad. A. v. 214. Minerva ſays that Chryſeis was taken from Achilles ὕϐριος εἵνεκα, to rub an affront upon him. It was therefore an injury, and not theft or robbery. And he is more properly ſaid to have damaged than to have ſtollen, who, as Horace ſays, Serm. 1. 3. v. 116.

Teneros caules alieni infregerit horti.

But without doubt Cacus was guilty of theft properly ſo called,

Quatuor a ſtabulis præſtanti corpore tauros
Avertit, totidem forma ſuperante juvencas,
Atque hos, ne qua forent pedibus veſtigia rectis,
Cauda in ſpeluncam tractos, verſiſque viarum
Indiciis, raptos ſaxo occultabat opaco.
Virg. Æneid. 8. v. 207.

Tho' the ancients thought theſt might be ſaid of immoveables (l. 38. D. de uſurp. & uſucap. Gell. Noct. Attic. 11. 18. Plin. Hiſt. nat. 2. 68. Gronov. obſerv. 1. 4. p. 42.) yet this application of the word is inconvenient, and therefore we do not uſe it in that ſenſe.

Sect. CCCXXII.

Indirectly by defrauding.

One is ſaid to take away another's poſſeſſion *indirectly*, who by fraudulent words or deeds is the cauſe of his loſing it; and this we call *defraudation*. Now ſince one is likewiſe hurt in this manner, but none ought to do to another what he would not have done to himſelf (§ 177); it is ſelf-evident, that they are no leſs guilty than thiefs and robbers, who, by inſidious words, cheat one out of his goods *; or by moving boundaries, uſing falſe weights and meaſures, and other ſuch knaviſh practices, adventure to take off any thing from one's eſtate.

* For all theſe crimes agree in one common end, this being the deſign of the thief, the robber and the defrauder, to bereave others of their goods. They agree alſo with regard to the motive or impelling cauſe, *viz.* knavery. They agree likewiſe in the effect, which is making one poorer. Nay the defrauder is ſometimes worſe than the thief or robber in this reſpect, that he circumvents one under the mask of friendſhip, and therefore cannot be ſo eaſily guarded againſt as a thief or robber. They are therefore, with good reaſon, joined together by that excellent teacher of morals, Euripides in Helena, v. 909. who there ſays, " God hates force, and commands every one to poſſeſs the purchaſe of his own induſtry, and not to live by plunder. Baſe and unjuſt riches are to be renounced with contempt." To which unjuſt and baſe riches belongs more eſpecially, as every one will readily acknowledge, whatever one knaviſhly cheats others of.

Sect. CCCXXIII.

What is another's ought to be reſtored to him.

The laſt right which belongs to the lord of a thing, *viz. the right of recovering it*, muſt found an obligation *to reſtore what belongs to another to its owner*. But hence we conclude, that every one, into whoſe hands any thing belonging to another comes without his fault, is obliged to take care that it be reſtored to its owner *; and therefore, that it ought not to be hid or concealed, but that public notice ought to be given of it, that the owner may have it again, upon making his right to it appear, Deut. xxii. 1. l. 43. § 4. D. de furt. and that the poſſeſſor ought to be much more ready to reſtore it, if the author claim it, or publickly advertiſe his having loſt it. But in both caſes equity requires partly that the reſtitution ſhould not be made at the expence of an honeſt poſſeſſor, and partly that he may not be made richer at another's coſt (§ 312.)

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* But even this obligation to reſtitution does not always take place, becauſe ſometimes right reaſon diſſuades from reſtitution, ſometimes the civil laws free the poſſeſſor from all obligation to reſtitution. An example of the firſt caſe is a madman claiming his ſword depoſited by himſelf; of which Seneca of benefits, 4, 10. Cicero de offic. 1. 10. 3. 25. And like examples are adduced by Ambroſ. de offic. 1. ult. To the laſt exception belong *uſucapion* and *preſcription*. For that theſe are unknown to the law of nature, ſeems moſt certain and evident; becauſe time, which is a mere relation, can, of its own nature, neither give nor take away dominion. And, as we obſerved above, our dominion cannot otherwiſe paſs to another than by tradition or transferring. Whence it is plain, that one can neither acquire dominion without ſome deed of the proprietor, nor can the proprietor loſe it without ſome deed of his own. Wherefore *uſucapion* and *preſcription* owe their origine to civil laws, which introduced both for the public good, l. 1. D. de uſurp. & uſucap. partly to put a period to the trouble and danger of conteſts, Cicero pro Cæcin. c. 26. partly to excite men who are indolent and neglectful, to reclaim their goods in due time, by giving them to ſee the advantages of vigilance above negligence; ſo that the obſervation of Iſocrates is very juſt in Archidam. p. 234. " All are perſuaded that poſſeſſions, whether private or public, are confirmed by long preſcription,

tion, and juſtly held as patrimonial eſtate." But it does not follow, that whatever many are perſuaded of is therefore a precept of the law of nature. And this it was proper to mention, that none may be ſurprized that we have taken no notice of *uſucapion* and *preſcription* in treating of property or dominion.

Sect. CCCXXIV.

What if the true owner do not appear.

But if the true owner do not appear to claim a thing, it is underſtood to be no body's, and therefore it juſtly falls to the honeſt poſſeſſor * (§ 241.) And tho' thoſe who have aſſumed to themſelves the direction of conſciences, commonly exhort to give things to the poor when the owner of them does not appear; yet he cannot be called unjuſt, who, making uſe of his right, takes to himſelf a thing morally free from dominion. See Nic. Burgund. ad conſu. Flandr. l. 2. n. 1.

* Beſides, the maſter of a thing alone has the right of excluding others from the uſe of it. Since therefore the maſter does not appear, none has this right; and, for this reaſon, nothing hinders why an honeſt poſſeſſor may not retain it to himſelf. But becauſe in many countries things free from dominion of any value may be claimed by the people or prince (§ 242), it is plain, that in ſuch countries, where that cuſtom or law prevails, an honeſt occupant ought to offer things, the maſter of which is not known, to the magiſtrates, and may expect from them μὴνυτρον, the reward of telling (Grotius of the rights of war and peace, 2. 10. 11.)

REMARKS on this Chapter.

We have not had occaſion for ſome time to add to our Author, or to make any remarks on his reaſonings. And indeed the reaſon why I chooſe to tranſlate this Author into our language, is becauſe there is ſeldom any occaſion to add to what he ſays, and almoſt never any ground of diſputing againſt him, ſo orderly, clear, juſt and full, is his method of proceeding in this moſt uſeful of all ſciences. But becauſe *uſucapion* and *preſcription* are uſually treated of at greater length by writers on the laws of nature and nations than our Author does; and becauſe this is a proper occaſion to explain a little upon the diſtinctions that are commonly made by moraliſts about the dictates of the law of nature and right reaſon, or conformity to them, let me ſubjoin the following obſervations.

1. Firſt of all, it is proper to obſerve the difference which the Roman law makes between *preſcription* in general, and that kind of it which they diſtinguiſhed by the name of *uſucapio*. By *uſucapio* they meant the manner of acquiring the property of things by the effect of time. And preſcription had alſo the ſame meaning; but it ſignified moreover the manner of acquiring and loſing all ſorts of rights and actions, by the ſame effect of the time regulated by law. See l. un. C. de uſucap. transf. & Inſt. de uſucap. and Domat's civil law, in their natural order, T. 1. p. 485. But writers on the law of nature have now very ſeldom occaſion to make uſe of the word *uſucapio*; that of *preſcription* being now common by uſage, both to the manner of acquiring the property of things, and to that of acquiring and loſing all ſorts of rights by the effect of time. 2. The chief reaſons aſſigned by the Roman law for the firſt introducing of property by preſcription, are, as Pufendorff of the law of nature and nations hath obſerved, book 4. cap. 12. § 5. "That in order to the avoiding of confuſion, and cutting off diſputes and quarrels, it is of great conſequence to the public welfare, that the proprieties of things ſhould be fixed and certain amongſt the ſubjects, which would be impoſſible, ſhould perpetual indulgence be allowed to the negligence of former owners, and ſhould the new poſſeſſors be left in continual fear of loſing what they held. (Ne ſcilicet quarundam rerum diu & fere ſemper incerta dominia eſſent, l. 1. ff. de uſurp. & uſucap.) Again, trade and commerce could not otherwiſe ſubſiſt in the world. For who would ever contract with another? who would ever make a purchaſe, if he could never be ſecured in the quiet poſſeſſion of any thing conveyed to him? Nor would it be a ſufficient remedy in this caſe, that if the thing ſhould be thus challenged by a third party, the perſon from whom we receive it ſhould be obliged to make it good; for after ſo long a courſe of time, thouſands of accidents might render him incapable of giving us this ſatisfaction. And what grievous commotions muſt ſhake the commonwealth, if at ſo vaſt a diſtance of years, ſo many contracts were to be diſannulled, ſo many ſucceſſions were to be declared void, and ſo many poſſeſſors to be ejected? It was therefore judged ſufficient to allow ſuch a time, as large as in reaſon could be deſired, during which the lawful proprietors might recover their own. But if through ſloth and neglect they ſuffered it to ſlip, the *Prætor* might fairly reject their too late importunity. And tho' it might ſo happen, that now and then a particular perſon loſt his advantage of recovering his goods, utterly againſt his will and without his fault, only becauſe he was unable to find out the poſſeſſor, yet the damage and inconvenience ariſing from that general ſtatute to ſome few private men, is compenſated by the benefit it affords to the public." It was a judicious reflexion of Aratus of

Sicyon in Tully's offices, l. 2. c. 23. "He did not think that poſſeſſions of fifty years ſhould be diſturbed, becauſe in ſo long time many things in inheritances, purchaſes and portions, might be held without an injury to any." 3 Now from the nature of property acquired by preſcription, *i. e.* by the effect of time regulated by law, and the reaſons upon which the utility, or rather neceſſity of it is founded, it is plain on the one hand, that whatever is not ſubject of commerce, cannot be the object of preſcription, ſuch as *liberty*; ſo prime, ſo eſſential a bleſſing; a bleſſing ſo much dearer than life, that none can ever be preſumed ſo much as tacitely to have conſented to be a ſlave! Liberty, a bleſſing, a right in the nature of things unalienable; or to renounce which is contrary to nature, and the will of the author of nature, who made all men free! *Public places, goods belonging to the public*, &c. So, on the other hand, whatever is the object of commerce may be the object of preſcription, *i. e.* property in it may be acquired by the effect of time. As every man who is otherwiſe capable of acquiring dominion, is likewiſe capable of preſcribing; ſo by this right of preſcription we may acquire dominion over both ſorts of things, moveable and immoveable, unleſs they are particularly excepted by the laws. But moveable things may paſs into preſcription ſooner than immoveable, for this reaſon, that immoveables are judged a much greater loſs than moveables; that they are not ſo frequently made the ſubject of commerce between man and man; that it is not ſo eaſy to acquire the poſſeſſion of them, without knowing whether the party that conveys them be the true proprietor or the falſe; and conſequently, that they are likely to occaſion fewer controverſies and ſuits. Plato's rules for the preſcription of moveables are theſe: "If a thing of this kind be uſed openly in the city, let it paſs into preſcription in one year; if in the country in five years: if it be uſed privately in the city, the preſcription ſhall not be compleated in leſs than three years. If it be thus held with privacy in the country, the perſon that loſt it ſhall have ten years allowed him to put in his claim, de leg. l. 12." As for the preſcription of immoveables, the conſtitution of Plato's commonwealth was not acquainted with it. It is proper to obſerve here, that by the civil law preſcription has not only reſpect to property; but it deſtroys other rights and actions when men are not careful to maintain them, and preſerve the uſe of them during the time limited by the law. Thus a creditor loſes his debt for having omitted to demand it within the time limited for preſcription, and the debtor is diſcharged from it by the long ſilence of his creditor. Thus other rights are acquired by a long enjoyment, and are loſt for want of exerciſing them. See Domat's civil law, &c. T. 1. book. 3. t. 7. § 4. 1. and the Roman laws there quoted. And all the long reaſonings in *Thomaſius de perpetuitate debitorum pecuniariorum*, and in *Titus*'s *obſervations on Lauterbach, obſ.* 1033, and elſewhere, quoted by the very learned Barbeyrac on Puſendorff, of the law of nature and nations, book 4. cap. 12. 1. to ſhew how far preſcription is of natural right, and what civil law adds to it, do not prove, that the law of nature does not permit, nay require, that a time ſhould be limited, even for claiming rights, upon the elapſing of which, rights and actions, and what the lawyers call incorporeal things, are preſcribed. No one ever pretended, that the law of nature fixed a time which gave a title by preſcription with regard to things corporeal or incorporeal. But if ſecurity of property and commerce require, that ſuch a time ſhould be fixed, where there is property and commerce, then the law of nature or right reaſon requires that a time preſcribing be fixed ſo far as ſecurity of property and commerce, and quiet poſſeſſion by honeſt induſtry require it, whether with reſpect to corporeal or incorporeal things. Let me juſt add upon this head, that whereas it was ſaid above, that things out of commerce cannot be preſcribed, yet by the civil law one may acquire or loſe by preſcription, certain things which are not of commerce; but it is when they are connected with others, of which one may have the property. They are acquired by their connection with ſuch other things. See Domat ibidem. Now, if here alſo it be ſaid, that the law of nature knows no ſuch diſtinction: the anſwer is, that the law of nature or right reaſon acknowledges every diſtinction which the public utility of a ſtate requires, in order to prevent confuſion and quarrels, and to render honeſt induſtry ſecure in the enjoyment of its juſt acquiſitions. For, 4. whatever diſtinctions moral writers have made about belonging or being reducible into the law of nature, directly or indirectly, immediately, remotely, or abuſively; this is plain, that in order to determine what the law of nature or right reaſon ſays about a caſe, the circumſtances of the caſe muſt be put. For in the ſcience of the law of nature, as well as other ſciences, however general the rules or canons may be, yet in this ſenſe they are particular, that they only extend to ſuch or ſuch caſes, ſuch or ſuch circumſtances. Now, if we apply this general poſition to the preſent queſtion, it will appear that preſcription is of the law of nature, in the ſame ſenſe that teſtamentary ſucceſſion, or ſucceſſion to inteſtates is of the law of nature, *viz.* That right reaſon is able to determine with regard to preſcription, in like manner as with regard to the others, ſome general rules which equity and public, common ſecurity require to be ſettled about them, where any number of men live in commerce, and property is eſtabliſhed, that induſtry may have due liberty and ſecurity. Teſtamentary ſucceſſion, and ſucceſſion to inteſtates, as we have found them to be regulated by right reaſon, may be detrimental in ſome caſes to the public, becauſe in ſome caſes, it may be more the intereſt of the public that any other ſhould ſucceed to an eſtate than the heirs according to theſe general rules with regard to ſucceſſion, by or without teſtament. But notwithſtanding ſuch detriment that may in ſome caſes happen to the public, general rules about ſucceſſion are neceſſary; and none are fitter to be ſuch than thoſe which moſt encourage induſtry,

duſtry, by beſt ſecuring the poſſeſſor in his right of diſpoſing of his own, the great motive to induſtry; and thoſe which determine ſucceſſion in the way it is propereſt for the general good, that men's affections ſhould operate towards others. In like manner, whatever detriment may ariſe in certain caſes from the general rule, that time ſhould give a title by preſcription; yet the general rule ought to obtain, becauſe it is the beſt general rule that can be conceived, the leaſt inconvenient, or rather the beſt for the ſecurity of commerce and property, being the beſt encouragement to honeſt induſtry, by giving the ſecureſt poſſeſſion of its honeſt acquiſitions. In fine, if we ask what the law of nature ſays about ſucceſſion, or preſcription, or any thing elſe, we muſt put a caſe or enumerate the circumſtances; and therefore, we muſt either ask what it requires about them where men are in a ſtate of nature, or where men are under civil government. If we confine the queſtions of the law of nature to the former caſe (tho' there be diſtinctions to be made even in that caſe, as will appear afterwards) yet we limit the ſcience too much, and render it almoſt uſeleſs: But if we extend it to what right reaſon requires under civil government, we muſt, in order to proceed diſtinctly, define the principal end of the civil conſtitution, and its nature, before we can anſwer the queſtion; which will then be twofold. Either, 1. What that particular conſtitution requires, in conſiſtency with its end and frame, with regard to preſcription, for inſtance, or any other thing? Or, 2. Whether the end and frame of that conſtitution requiring ſuch and ſuch rules about preſcription for inſtance, or ſucceſſion, or any other thing, be a good end, and a good frame, *i. e.* whether all the parts of it, conſidered as making a particular conſtitution, do make one conſonant to the great general end of all government, *public happineſs?* Thus, if we attend to the neceſſity of thus ſtating the meaning of what is called determination by natural law, we will eaſily ſee that what is urged from the laws in the Jewiſh commonwealth againſt preſcription, does not prove that right reaſon does not require that every ſtate ſhould make ſome regulation with regard to the effect of time, as to ſecurity in poſſeſſion. For tho' the divine law, which prohibited perpetual alienations for ſeveral reaſons, aboliſhed by that means preſcription, yet the letter of this law being no longer in force, where alienations which transfer the property for ever are allowed, the uſe of preſcription is wholly natural in ſuch a ſtate and condition, and ſo neceſſary, that without this remedy every purchaſer and every poſſeſſor being liable to be troubled to all eternity, there would never be any perfect aſſurance of a ſure and peaceable poſſeſſion. And even thoſe who ſhould chance to have the oldeſt poſſeſſion, would have moſt reaſon to be afraid, if together with their poſſeſſion they had not preſerved their titles. See Domat's civil laws, *&c.* T. 1. p. 483. God, for reaſons ariſing from the conſtitution of the Jewiſh republic, forbad the perpetual alienation of their immoveable eſtates (and not of their goods in general, as ſome objectors againſt preſcription urge) but all their laws concerning uſury, conveyances, and other things, were neceſſarily connected together, and with their Agrarian law, (as we ſhall ſee afterwards). And therefore there is nothing in the law of Moſes that condemns preſcription as an unjuſt eſtabliſhment; and we can no more infer it from hence to be ſuch (as Barbeyrac well obſerves, ibidem) than we may conclude that the perpetual alienation of lands is odious, and not conformable to natural right. But not to inſiſt longer on this head, it is not only evident that the law of nature for the ſecurity of property and the encouragement of induſtry requires, that a time ſhould be regulated for the effect of poſſeſſion as to preſcribing, in all ſtates which admit of alienations and commerce; but that it requires that this time ſhould be the moſt equal that can be fixed upon, all the circumſtances of a particular ſtate being conſidered, with regard to the non-diſturbance of honeſt induſtry, *i. e.* the propereſt to prevent unjuſt diſpoſſeſſion on either ſide, *i. e.* either with reſpect to the firſt or the laſt poſſeſſor. And therefore, 4. There is no difficulty with regard to the following general maxims about it. 1. That preſcription may affectually proceed, 'tis requiſite that the party receiving the thing at the hands of a falſe proprietor, do obtain this poſſeſſion by a juſt title; and conſequently, that he act in this matter *bona fide*, with fair and honeſt intention. For this is neceſſary to juſt poſſeſſion. "A man doth not become a juſt poſſeſſor of a thing barely by taking it to himſelf, but by holding it innocently." Detaining is otherwiſe, as Tacitus expreſſes it, *diutina licentia*, a long continued injuſtice. Upon this head Pufendorff obſerves, that according to the civil law, 'tis enough if a man had this uprightneſs of intention at his firſt entring on the poſſeſſion, though he happens afterwards to diſcover, that the perſon who conveyed it to him was not the juſt proprietor. But the canon law requires the ſame integrity throughout the whole term of years, on which the preſcription is built. But Barbeyrac juſtly takes notice in his notes, "That the maxim in the civil law is better grounded than that of the canon law. And the artifice of the clergy conſiſts not ſo much in this, that the determinations of the Popes require a perpetual good intention in him that preſcribes, as in this, that they will have the goods of the church look'd upon as not capable of being alienated, either abſolutely, or under ſuch conditions as will make all preſcriptions void." 2. Another neceſſary condition is, that it be founded on conſtant poſſeſſion, ſuch as hath not been interrupted, either *naturally*, as if the thing hath returned in the mean while to the former owner, or hath at any time lain abandoned or forſaken: or *civilly*, as if the owner had been actually engaged at law with the poſſeſſor for the recovery of what he loſt; or at leaſt by ſolemn proteſtations hath put in a ſalvo to his right. 3. That the ſpace of time during which the prime poſſeſſor holds the thing, ſhall be reckoned to the benefit of him that ſucceeds in the poſſeſſion, provided that both the former and the latter firſt entered upon it with honeſt minds, and upon a juſt title. For otherwiſe the prime poſſeſſor ſhall not be allowed to make over his time to the next holder, and conſequently, if the former come to the poſſeſſion by diſhoneſt means, the time he paſſed in it ſhall not be computed towards the preſcription of the latter, tho' he, for his own part, obtained the poſſeſſion fairly and juſtly. See Pufendorff, ibidem. 4. Preſcription does not run againſt minors. And if one that is major happens to have a right undivided with a minor, the preſcription which could not run againſt the minor, will have no effect againſt the major. And the ſame reaſon for which preſcription does not run againſt minors, hinders it likewiſe from running againſt thoſe whom a long abſence diſables from purſuing their rights; which is to be underſtood not only of abſence on account of public buſineſs, but alſo of other abſences occaſioned by accidents, ſuch as captivity. See Domat's civil law, ibidem. And for the ſame reaſons, it is highly agreeable to reaſon, that the time during which a country hath been the ſeat of war, ſhall not avail towards preſcription. But with regard to minority, it is remarked by Pufendorff ibidem, that there may be a caſe in which the favour of poſſeſſion ſhall overbalance the favour of majority. As for inſtance, ſuppoſe it ſhould ſo happen, that when I want only a month or two of compleating my preſcription, and it is morally certain that the ancient proprietor will not within that ſpace give me any trouble about the title, and if he ſhould then deceaſe leaving an infant heir, it would be unreaſonably hard, if after five and twenty years poſſeſſion, I ſhould be thruſt out of my hold for want of thoſe two months, eſpecially if it be now impoſſible for me to recover damages of him from whom I received what is thus challenged, as I might have done, had the diſpute happened before the goods devolved on the minor. See this ſubject more fully diſcuſſed than it can be done in a ſhort note, by Pufendorff and Grotius. It is ſufficient for our purpoſe to have taken notice of theſe few things relative to preſcription; and to have obſerved once for all, that unleſs the determinations of the law of nature be confined to ſignify the determinations of right reaſon with regard to a ſtate of nature, (a very limited ſenſe of the law of nature, in which it is hardly ever taken by any writer) every deciſion of right reaſon concerning equity, juſtice, and neceſſity or conduciveneſs to the public good of ſociety, or of men having property and carrying on commerce, is a deciſion of the law of nature. Whatever reaſon finds to be the beſt general rule in this caſe is a law of nature; and in this ſenſe, preſcription is of the law of nature, *i. e.* reaſon is able to ſettle ſeveral general rules about it in conſequence of what commerce, the ſecurity of property, and the encouragement of induſtry make neceſſary. So that where reaſon is able to make any ſuch deciſions, it is an impropriety to ſay, that thing is not of the law of nature, becauſe ſome forms and modes relative to it muſt be determined and ſettled by convention, or by civil conſtitution; as the particular ſpaces of time, for inſtance, with regard to preſcription of moveables and immoveables, *&c.* muſt be. For if right reaſon requires, that time ſhould have a certain effect with regard to property, then is preſcription of the law of nature, which by its definition is the acquiſition or addition of a property, by means of long poſſeſſion. But indeed we may ſafely ſay, that the law of nature is an abſolute ſtranger to the debates among lawyers, whether preſcription ſhould be defined with Modeſtinus *adjectio*, or *adeptio* with Ulpianus; for all ſuch diſputes are mere verbal wranglings, grievouſly cumberſome to right reaſon and true ſcience.

CHAP. XIII.

Concerning things belonging to commerce.

Sect. CCCXXV.

How men began to want many things.

AFter men had departed from the negative communion of things, and dominion was introduced, they began to appropriate uſeful things to themſelves in ſuch a manner, that they could not be forced to allow any one the uſe of them, but might ſet them aſide wholly for themſelves, and their own uſe (§ 236). But hence it followed of neceſſity, that all men had not the ſame ſtock, but that ſome abounded in things of one kind, which others wanted; and therefore one was obliged to ſupply what was wanting to himſelf either by the labour of another, or out of his proviſion. Yea, becauſe every ſoil does not produce every thing *, neceſſity forced men to give to others a ſhare of the things in which they abounded, and which they had procured by their own art and induſtry, and to acquire to themſelves what they wanted in exchange; which when they began to do, they are ſaid to have inſtituted *commerce*.

* To this purpoſe belongs that elegant obſervation in Virgil, georg. 1. v. 54.

This ground with Bacchus, that with Ceres ſuits,
That other loads the trees with happy fruits.

A fourth with graſs, unbidden decks the ground,
Thus Tmolus is with yellow ſaffron crown'd.
India black ebon and white ivory bears,
And ſoft Iduma weeps her od'rous tears.
Thus Pontus ſends her beaver ſtores from far,
And naked Spaniards temper ſteel for war.
Epirus for the Elian chariot breeds,
(In hopes of palms) a race of running ſteeds.
Thus is th' original contract; theſe the laws
Impos'd by nature, and by nature's cauſe.

To the ſame effect does this poet ſing at greater length, georg. 2. v. 199. & ſeq. Compare with theſe paſſages, Varro de re ruſtica, 1. 23. Ovid. de arte amandi, 4. v. 578. and above all, Seneca, ep. 87. who having quoted the paſſage of Virgil above cited, adds, "Theſe things are thus ſeparated into different provinces, that commerce amongſt men might be neceſſary, and every one might want and ſeek from another." Ariſtotle urges the ſame origine and neceſſity of commerce, Nicomach. 5. 8. Polit. 1. 6.

Sect. CCCXXVI.

The neceſſity of commerce.

Indeed if all men were virtuous, none would have reaſon to fear any want. For every one would then liberally give to thoſe who wanted of what he had in abundance (§ 221). But ſince the love of mankind *hath waxed cold*, and we live in times when virtue is praiſed, and ſtarves, there was a neceſſity of deviſing that kind of commerce, by which another might be obliged, not merely by humanity and beneficence, but by perfect obligation, to transfer to us the dominion of things neceſſary or uſeful to us, and to aſſiſt us by their work and labour.

Sect. CCCXXVII.

That could not be done but by contracts.

By *commerce* therefore we underſtand the exchange of uſeful things and labour, ariſing not from mere benevolence, but founded on perfect obligation. But ſince by commerce either work is performed, or dominion and poſſeſſion is transferred, which obligation ought to be extorted from none without his knowledge, and againſt his will (§ 320); the conſequence is, that commerce requires the conſent of both parties. Now, that conſent of two perſons concerning the exchange of neceſſary work, or things which is not of mere humanity and beneficence, but of perfect obligation, is commonly called *a contract*; and therefore it is obvious, that commerce cannot be carried on without the intervention of contracts *.

* This is obſerved by Iſocrates, except. adv. Callimach. p. 742. " There is ſuch a force in pacts, that many affairs among the Barbarians, as well as Greeks, are tranſacted by them. Upon the faith of them we bargain, and carry on commerce. By them we make contracts with one another; by them we put an end to private feuds or public war. This one thing all men continue to uſe as a common good."

Sect. CCCXXVIII.

Moſt of them ſuppoſe the price of labour and things fixed.

From the nature of commerce, as it hath been defined (§ 327), it is evident, that it will rarely happen that one will communicate his goods or labour with another gratuitouſly; but every one will deſire ſomething to be returned to him, which he thinks equivalent to the goods or labour he communicates. Wherefore, thoſe who would commute things or labour one with another, muſt compare things together; which compariſon cannot otherwiſe be made, than by affixing a value to things, by means of which an equality can be obtained and preſerved. But a quantity, moment, or value affixed to goods and labour, by means of which they may be compared, is called *price*. And therefore moſt contracts cannot take place without affixing or ſettling *price* *.

* Hence by the Greeks not only pacts and contracts, but all kinds of commerce are called *συμβολάς*, *σύμβολα*, *συμβόλαια*, *συμβολαια κοινωνικα*, from the verb *συμβάλλειν*, which ſignifies to bring together and compare. For thoſe

who are to interchange goods or labour, compare them together, every one aſſigns a certain value to his goods or work, and ſo demands a proportional return. Thus, *e. g.* if we fix the proportion of gold to ſilver to be as eleven to one, we affix to each metal a moral quantity or price; which being done, nothing is more eaſy than to exchange theſe metals, and keep equality. But we ſay moſt contracts ſuppoſe the price of things determined, not all. For ſome are gratuitous, and therefore contracts are rightly divided into *onerous*, when the burden on both ſides is equal; *beneficent*, when one obliges himſelf to do any thing to another gratuitouſly; and *contracts of chance*, in which fortune ſo reigns, that one may receive what is done by another ſometimes with, and ſometimes without any onerous title.

Sect. CCCXXIX.

Price is either vulgar or eminent.

This compariſon is inſtituted either between goods and work by themſelves, or a common meaſure is applied, by which all other things are valued. In the firſt caſe, *vulgar* or *proper price* takes place, or the value we put upon goods and labour compared amongſt themſelves. In the latter caſe, there is a common meaſure by which we eſtimate all things that enter into commerce, which is called *eminent price* *; ſuch as is money amongſt us. But in both caſes equality is required.

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* Hence Ariſtotle juſtly defines money; "A common meaſure to which all things are referred, and by which all things are eſtimated," Nicomach. 9. 1. And hence all things which enter into commerce are ſaid to be purchaſable by money. This alone is reprehenſible, that men ſhould eſtimate things by money, which do not enter into commerce; ſuch as, juſtice, chaſtity, and conſcience itſelf. And againſt this venality the antient poets have ſeverely inveighed. Horat. ſerm. 2. 3. v. 94.

Omnis enim res,
Virtus, fama, decus, divina humanaque, pulchris
Divitiis parent: quas qui conſtruxerit, ille
Clarus erit, fortis, juſtus, ſapienſve etiam, & rex,
Et quidquid volet.

So Propertius, 3. 10.

Aurea nunc vere ſunt ſæcula, plurimus auro
  Venit honos, auro conciliatur amor.
Auro pulſa fides, auro venalia jura,
  Aurum lex ſequitur, mox ſine lege pudor.

Many ſuch like paſſages are to be found among the antients, as in Petronius's ſatyricon, c. 137. and in Menander, of whom we have this elegant ſaying concerning a rich man preſerved;

Opta modo, quidquid volueris: omnia evenient:
Ager, domus, medici, ſupellex argentea,
Amici, judices, teſtes: dederis modo.
Quin & deos ipſos miniſtros facile habebis.

Sect. CCCXXX.

How vulgar or proper price is fixed.

That in the earlier times of the world men knew nothing but the *proper* price of things, is plain, becauſe eminent price could not have been inſtituted without the conſent of many; but every one impoſed vulgar price upon his own work and goods at his pleaſure. But ſince that is done with intention, and in order to purchaſe by them what one wants from another (§ 325); it is plain, that regard ought to be had in fixing the price of goods and labour to others from whom we want certain things; and therefore they ought to be eſtimated at ſuch a rate, as it is probable others will be willing to purchaſe them *.

* For if we ſuppoſe the Arabians to eſtimate their incenſe and ſpiceries at ſuch a price, that they would not give above one dram of them for ſix hundred buſhels of corn, they would never get corn at that price, becauſe none would exchange it upon ſo unequal terms, nor would others get their ſpices; and thus there would be a ſtop to commerce, for the ſake of which price is deviſed. Since therefore the means ought to be as the end, the conſequence is, that price ought to be fixed ſo that commerce can be carried on; and for this reaſon, in ſettling it regard ought to be had to others from whom we would purchaſe any thing.

Sect. CCCXXXI.

What circumſtances ought to be attended to in fixing it.

Now, ſince work or things ought to be valued at ſuch a price as it is probable others from whom we want any thing will purchaſe them; it is obvious, that ſometimes the neceſſity and indigence of others will raiſe the price of things *; and ſometimes the ſcarcity of the thing will raiſe it; and that regard ought likewiſe to be had to workmanſhip, the intrinſic excellence of the thing, the labour and expence beſtowed upon it, the danger undergone for it; and, in fine, to the paucity or multitude of thoſe who want the goods or labour, and various other ſuch circumſtances.

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* It is true indeed, that the moſt neceſſary things have not always the higheſt price, kind providence having ſo ordered it, that the things which we can leaſt diſpenſe with the want of are abundant every where; and thoſe things only are rare and difficult to be found, which are not neceſſary, and which nature itſelf does not crave, as Vitruvius juſtly philoſophizes, Architect. 8. præf. But if neceſſity be joined with ſcarcity, *e. g.* if there is every where a dearth of corn, the price of it riſes very high, as experience tells us. And then happens, as Quintilian ſays, declam. 12. "In magna inopia, quidquid emi poteſt, vile eſt." "In great ſcarcity, what can be bought is cheap." The ſeven years famine in Egypt was an inſtance of this, Gen. xlvii. 14. & ſeq.

Sect. CCCXXXII.

What is called price of affection.

It may be objected, that men are accuſtomed to put an immenſe value upon their own goods, a much greater certainly than any one will purchaſe them at, whether it be that the author renders them precious, or their rarity, or ſome remarkable event which they recal to our memory. But ſince we are now treating of the duties which ought to be obſerved in commerce, and that kind of price is not commonly conſidered in commerce, but only ly in repairing damages * (§ 212), it is evident that this price does not deſtroy our rule.

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* Fancy or affection is of ſuch a nature, that it cannot paſs from one to another; and therefore it will be no motive to one to purchaſe a thing from me at a greater price, becauſe it is agreeable to me on account of its ſerving to recal ſomething to my memory that gives me pleaſure. But this however is but generally true: for ſometimes in commerce even this price is conſidered; as when, 1. The affection to a thing is common on account of the author or artiſt, or of its ſingular beauty and rarity. Hence the ſtatues of Phidias, and the more finiſhed pictures of Apelles or Parrhaſius, ſold at a higher than the vulgar or proper price, becauſe they deſerved the common eſteem of all mankind. 2. If the purchaſer has a greater affection to a thing than the poſſeſſor; *e. g.* if my poſſeſſion would greatly better another's, and he therefore deſire, like him in Horace, who thus ſpeaks, ſerm. 2. 6.

O ſi angulus ille
Proximus accedat, qui nunc denormat agellum!

Sect. CCCXXXIII.

Why eminent price was invented.

But ſince commerce was inſtituted among men that one might ſupply his wants out of another's ſtock or labour (§ 326), and price was deviſed for no other reaſon but that equality might be obtained in the exchange of goods or labour (§ 328); it could not but happen very often, that one might not have a very great abundance of what another might want, that one might deſpiſe what another would deſire to exchange, and that the value of things which perſons might deſire to commute, might be ſo uncertain and variable, that ſome of the parties muſt run a riſk of loſs; and that the things to be exchanged might be of ſuch a bulk, that they could not be commodiouſly tranſported to diſtant places, or could not be taken proper care of in the journey.—All which inconveniencies not being otherwiſe avoidable, neceſſity itſelf at laſt deviſed ſome eminent price that all would receive, and the proportion of which to goods could eaſily be determined *.

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* This is obſerved by Paullus JC. l. 1. D. de contra empt. who deſcribes the origine of buying and ſelling as above. Ariſtotle likewiſe gives much the ſame account of the matter, ad Nicomach. § 8. and Polybius 1. 6. upon which paſſages Perizonius hath commented with much erudition, de ære gravi § 2. p. 6. & ſeq. as has Duaren. upon that of Paullus animad. 1. 6.

Sect. CCCXXXIV.

Its neceſſary qualities.

The end of money, or eminent price, requires that the matter choſen for that purpoſe be neither too rare, nor too common, nor uſeleſs, and in itſelf of no price *; that it be eaſily diviſible into ſmall parts, and yet not too brittle; that it may be eaſily kept and laid up, and eaſily tranſported to any diſtance; becauſe, if it was too ſcarce, there would not be a ſufficient quantity of it to ſerve the uſes of mankind; and if it was too common, it would be of no price or value, in which caſe, it would not be received by all; if it could not be eaſily divided into any portions, equality in commerce could not be obtained by it; and yet, if it was too brittle, it would eaſily wear out by uſe, and thus its poſſeſſors would be impoveriſhed. In fine, if it could neither be conveniently kept, nor eaſily tranſported, the ſame inconvenience which rendered commerce difficult before the invention of it, would ſtill remain (§ *333*).

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* Wherefore Ariſtotle juſtly calls Money, Nicomach. 5. 8. "a ſurety, which if one carries along with him he may purchaſe any thing." Whence Pufendorff of the law of nature and nations, v. 1. 13. juſtly reaſons thus: "As we accept a man of known credit and value, and not every common fellow for a ſurety, ſo no man would part with his goods, which perhaps he had acquired with great labour and induſtry, for what he might meet with any where, as a handful of duſt and ſand; it was neceſſary

therefore, that money ſhould conſiſt of ſuch a matter, as might be convenient for keeping, and by reaſon of its ſcarcity, ſhould have the value of many things crowded and united with it."

Sect. CCCXXXV.

Why the nobler metals are uſed to this purpoſe.

But becauſe theſe properties belong to no other matter but the more precious kinds of metals, as gold, ſilver and braſs; theſe metals are therefore applied to this uſe, and hence coined money of various weights and ſizes hath ſeemed to moſt civilized nations the propereſt ſubſtance to anſwer the ends of commerce. If any people hath thought fit to give an eminent price to any other matter *, it hath been done out of neceſſity, and for want of money, and with this intention, that the ſcarcity or difficulty being over, every one might receive ſolid money for the ſymbolical; or ſuch money hath only been uſed by a nation within itſelf, and was not proper for carrying on commerce with foreign nations.

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* Thus the Carthaginians uſed inſtead of money ſomething I know not what, faſtened to a bit of skin, and marked with ſome public ſtamp, Æſchin. dialog. de divit. c. 24. p. 78. edit. Petri Horrei. The Lacedemonians an uſeleſs lump of iron, idem ibid. p. 80. Plutarch. Lycurg. p. 51. other nations uſed ſhells, Leo Afr. l. 7. others grains of corn, kernels of fruit, berries, lumps of ſalt, Pufendorff. § 1. 13. Examples of paper, leather, lead, and other things made uſe of for money in beſieged towns, are to be found (not to mention inſtances from more modern hiſtory) in Polyænus Strategem. 3. 10. and there Maſuic. p. 274. Seneca de beneficiis, 5. 14. But all ſuch money uſed in barbarous nations, is capable of carrying on but a very ſmall trade among themſelves. And ſymbolical money uſed in public calamities, is really to be conſidered as tickets or bills, which the ſupreme magiſtrate obliges himſelf to give ready money for, when the diſtreſs is over. Thus Timotheus is ſaid by Polyænus to have perſuaded merchants to take his ſeal for money, to be received upon returning it.

Sect. CCCXXXVI.

What price is to be put on money.

Tho' it belong to the ſupreme power in a ſtate to fix the value of money (as we ſhall ſhew afterwards in the proper place); yet, as with reſpect to vulgar or proper price, regard ought to be had to others from whom we would have any thing in exchange (§ 330); ſo it is evident, that a value ought to be put upon money, at which it is probable other nations, with whom we are in commerce, will not refuſe it; and therefore the value of it ought to be regulated according to that proportion of one metal to another, which is approved by neighbouring civilized nations, unleſs we would fright other nations from having any commerce with us, or be ourſelves conſiderable loſers.

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* For if we put too high a value on our money, foreign nations will either not care to have commerce with us, or they will raiſe the price of their commodities in proportion to the intrinſic value of our money. But if we put a leſs value on our money than neighbouring nations, nothing is more certain, than that our good money will remove to our neighbours, and their bad money will come to us in its room, ſo that none will know what he is worth. Hence it follows, in the more civilized nations, the proportion of gold to ſilver varying according to times, and being ſometimes as twelve, ſometimes as eleven, ſometimes as ten to one, the price of gold muſt be ſometimes higher and ſometimes lower. (See our diſſertat. de reduct. monet. ad juſt. pret. § 24.) Wherefore the Arabians could not but be great loſers, who, according to Diodorus Siculus, Bibliothec. 3. 45. received for braſs and iron an equal weight of gold; or, as Strabo, Geogr. 16. p. 1124. paid for braſs three times the weight of gold, for iron twice the weight, and for ſilver ten times the weight, partly through their ignorance of arts, and partly through their indigence of thoſe things which they bartered for it, that were more neceſſary to them. See what is related of the Peruvians by Garcillaſſ. de la Vega dans l'hiſtoire des Yncas, 5. 4. p. 425.

Sect. CCCXXXVII.

The moſt antient of all contracts before the invention of money was bartering.

That we may now come to the *contracts*, by means of which commerce is carried on (§ 327), it is obvious to every one, that one kind of contracts took place while the proper price of things only was known, and money or eminent price was not yet in uſe (§ 330), and that after money was invented another kind took place, and that ſome were known both after and before money was in uſe. Among thoſe which took place before money was in uſe, the firſt and principal is *bartering*. For in the firſt ages of the world commerce was only carried on by exchanging or bartering commodities and labour; and therefore bartering is the moſt antient of contracts; and it continued ſtill to be in uſe in many nations, after money was in uſe, as well as where no price was yet put upon gold, ſilver, and braſs*.

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* So it was among our anceſtors the ancient Germans, Tacitus de moribus Germ. c. 5. who obſerves, that in his time the Germans who lay neareſt to the Roman provinces, had conceived ſome deſire of money. Juſtin, hiſt. 2. 2. relates the like of the Scythians. Pomponius Mela of the Satarchi, a People in the European Scythia, de ſitu orbis, 2. 1. Strabo of the Spaniards, Geogr. 3. p. 233. The ſame is yet practiſed by ſeveral nations in Aſia, Africa and America: And it is the leſs to be wondered at with reſpect to barbarous countries, ſince the Greeks and Romans, long after the invention of money, carried on commerce in no other way but by barter. We have a noted example of it among the Greeks in Homer, Iliad 7. v. 482. and among the Romans in Plin. nat. hiſt. 18. 3. 33. 1.

Sect. CCCXXXVIII.

How many ſorts there are of it.

Bartering is giving ſomething of our own for ſomething belonging to another; which, becauſe it may be done two ways, *i. e.* either with, or without eſtimating and putting a certain price upon the things exchanged, it therefore follows, that when no eſtimation is made, is is called *ſimple bartering*; and when an eſtimation is made, and price fixed, it is called *eſtimatory bartering*. The former is ſomewhat like mutual donation, and the latter ſomewhat like buying and ſelling, l. 1. C. de permut. l. 1. § 1. D. de contr. emt. For tho' Pufendorff of the duties of a man and a citizen, 1. 15. 8. aſſerts that mutual donation is quite a different buſineſs from bartering, becauſe it is not neceſſary that equality ſhould be obſerved in it, yet there is no difference in this reſpect; for neither is equality obſerved in *ſimple bartering* *.

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* For in it, each of the contracting parties eſtimates not his own but the other's; and not at the juſt price others would put upon it, but according to his fancy; and ſo there is in ſuch a contract no equality of goods, but of affection or fancy only. Becauſe as often as the affection of the acquirer is greater than that of the poſſeſſor, regard is had in commerce, as we have already ſaid (§ 332), to price of affection. The commerce between Glaucus and Diomedes in Homer, exchanging their arms, furniſhes us with an example, Iliad 2. v. 236.

Aurea æreis, centena novenariis, &c.

Of which barter Maximus Tyrius, Diſſert. Platon. 23. very elegantly obſerves, "Neither did he who received the gold get more than he who got the braſs. But both acted nobly, the inequality of the metals being compenſated by the deſign of the exchange."

Sect. CCCXXXIX.

What is juſt with reſpect to ſimple barter.

Becauſe *ſimple barter* is ſomewhat like mutual donation, and it is not neceſſary that equality ſhould be obſerved in it (§ 338), it is plain neither of the contracting parties can have any reaſon to complain of being wronged, unleſs the other uſe force or guile (§ 322. and 321.) nor is ſuch a contract null on account of injury, except when he who exchanges a more precious thing for a thing of no value, has not the free diſpoſal of his goods (§ 317); and more eſpecially, if the thing thrown away in ſuch a manner, be of ſuch a kind that it cannot be alienated without doing ſomething baſe, unleſs the accepter himſelf be perchance guilty of equal baſeneſs.

* Hence it may be doubted, whether the exchange made by Jacob and Eſau, the latter of whom ſhamefully ſold his birth-right for pottage, Gen. xxv. 29. would have been valid *in foro humano.* For tho' Eſau was very blame-worthy in ſetting ſo ſmall a value upon the prerogative God had favoured him with, and he be on that account very juſtly called by the apoſtle, Heb. xii. 6. *a profane perſon*; yet Jacob acted no leſs baſely in taking advantage of his brother's hunger, to defraud him of ſo great a privilege (§ 322). For what Eſau could not ſell without a crime, that his brother could not buy without a crime; and it was his duty to diſſuade his brother from ſuch folly, and not to abuſe his weakneſs. But many things of this ſort are admirable in their typical ſenſe, which are ſcarcely defenſible by the rules of right reaſon.

Sect. CCCXL.

What is juſt with regard to eſtimatory permutation.

In *eſtimatory* permutation or barter, ſince here a price is put upon the things to be exchanged, (§ 338), equality ought certainly to be obſerved, and neither ought to wrong the other; nor is the barter valid if either be circumvened, unleſs the injury be of ſo little moment that it be not worth minding *.

* For the vulgar or proper price of things is either legal or conventional; the former of which is fixed by law, or the will of ſuperiors, the latter by the conſent of the contracting parties. Now, ſeeing the former is fixed, and conſiſts, as it were in a point, but the latter is uncertain, or admits of ſome latitude; in the former caſe one is juſtly thought to be wronged who does not receive the full price; in the latter caſe, the damage ought to be of ſome conſideration to invalidate the contract *in foro humano.* "For, as Seneca ſays of benefits, 6. 15. what's the mat-

ter what be the value of a thing, if the price be agreed upon between the buyer and the ſeller? The price of every thing is temporary. When you have highly praiſed things, they are juſt of ſo much value and no more than what they may be ſold for." Hence in formed governments, we may obſerve that a contract is only annulled when the injury is enormous, as by the Roman law, when one of the parties was wronged above half the price, l. 2. C. de reſcind. vendit.

Sect. CCCXLI.

Of the contracts, I give that you may do: I do that you may give; I do that you may do.

But men not only barter commodities, but likewiſe work for work, or work for other conſiderations; whence theſe contracts, *I give that you may do*; *I do that you may give*, *and I do that you may do*; which being of the ſame kind and nature with barter, or reducible to barter, *ſimple* or *eſtimatory* (§ 338), the ſame rules already laid down concerning them (§ 338) muſt, it is evident, be obſerved in thoſe contracts. For either one's work is eſtimated with reſpect to another's work or goods, (which kind of negotiation is called, not unelegantly, by Ammian. Marcell. hiſt. 16. 10. *pactum reddendæ viciſſitudinis*) or work for goods is done without any eſtimation *. And in the former caſe equality ought to be obſerved, and damage of any conſiderable moment ought to be repaired; but in the latter all complaints about wrong or hurt are to no purpoſe.

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* Such was the promiſe of Agamemnon in Homer, Iliad, 10. v. 135.

If gifts immenſe his mighty ſoul can bow,
Hear all ye Greeks, and witneſs what I vow:
Ten weighty talents of the pureſt gold,
And twice ten vaſes of refulgent mold;
Seven ſacred tripods, whoſe unſully'd frame,
Yet knows no office, nor has felt the flame;
Twelve ſteeds unmatch'd in fleetneſs and in force,
And ſtill victorious in the duſty courſe, &c.

All this to pacify Achilles.— Whence it is plain, that it was a practice for one to ſtipulate with one for ineſtimable ſervices, and to promiſe him for them whatever he thought would be moſt agreeable, without any regard to equality.

Sect. CCCXLII.

Contract of loan.

There are other contracts by which commerce was carried on before the invention of money, *viz.* all gratuitous ones, by which, what before was only owing to one by imperfect right, or by mere love and benevolence, became due to him by perfect right, ſuch as a contract of loan. For ſince we are obliged to what was called (§ 228) *officiouſneſs*, we are likewiſe bound to accord to one who may want it, the uſe of any *commodity* belonging to us not conſumable, with his obligation to reſtore it; *i. e.* to lend, or give in loan *. But the love of mankind becoming cold, it could hardly be hoped that one would do this ſervice to another ſpontaneouſly (§ 326), and therefore neceſſity forced men to invent a kind of contract, by which men might be obliged by perfect right thus to grant the uſe one to another of their not conſumable goods.

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* Loan therefore is a perfect obligation to allow another the uſe of ſomething belonging to us, on condition of his reſtoring it to us in ſpecie, gratis. And hence it is plain, that in natural law a loan ſcarcely differs from (precarium) what is granted to one upon his aſking it, between which there is however ſome difference in civil law. Hence alſo may this queſtion eaſily be decided, "Whether a contract of loan derives its eſſential obligation from the conſent of the contracting parties, or from the delivery of the thing?" For tho' by the law of nature, conſent alone to the uſe of a thing obliges (§ 327); yet it is not a loan till the thing be delivered; becauſe he to whom the promiſe of a loan is made, before he hath received the thing thus promiſed, is not obliged to reſtore it in ſpecie: it is only a pact or agreement about a loan. But that there is a difference between theſe two is plain from hence, that the borrower, by loan, is obliged to reſtore the thing, but by a compact about lending, he who promiſes to lend is obliged

to give the thing in loan: ſo that different obligations ariſe from theſe two negotiations.

Sect. CCCXLIII.

The duties of the borrower.

Now, becauſe the uſe of a thing is granted by loan, on condition of the borrower's reſtoring it in ſpecies * (§ 342), the former is obliged not only not to apply the thing borrowed to other uſes than thoſe for which it was given, but likewiſe to apply it to theſe uſes with the greateſt care and concern; and therefore, when the uſe is over, or when the proprietor re-demands it, to reſtore it to him in ſpecies, and if it hath ſuffered any damage by his fault, to repair it; but he is not bound to make up fortuitous damages, unleſs he had voluntarily ſo charged himſelf * *(§ 106)*; nor can he demand for any expences he may have laid out upon it, unleſs they exceed the hire to be paid for the letting of ſuch a thing.

* Grotius of the rights of war and peace, 2. 12. 13. was the firſt who diſtinguiſhed here, whether a thing would have periſhed in like manner in the hands of its proprietor or not; in the latter of which caſes, at leaſt, he thinks the loſs ſhould fall upon the borrower: And Pufendorff of the law of nature and nations, 5. 4. 6. is of the ſame opinion: So likewiſe Mornac, ad l. 1. C. commod. But ſince accidental or fortuitous events, ariſing merely from providence, are imputable to no perſon (§ 106), they certainly cannot be imputed even to a borrower. Nor is the divine law repugnant to this ſentence, Exod. xxii. 14. For it cannot be underſtood otherwiſe than when the borrower is in fault. See Jo. Clerici Comment. in Exod. p. 110.

Sect. CCCXLIV.

The contract of depoſite.

Again, the love of humanity obliges every one to promote the good of others to the utmoſt of his power (§ 216); but ſince we have only an imperfect right to demand ſuch good offices, it is often our intereſt to ſtipulate with others, in order to their being obliged by a perfect right to take the cuſtody of our things depoſited with them; and this is the intention of the contract of *depoſite* or *charge*, by which we underſtand a perfect obligation upon another to keep gratis our things intruſted to his faith, and to reſtore them to us upon demand in ſpecies *.

* Nothing was more ſacred among the ancients than this contract, becauſe the deponent repoſes the greateſt truſt and confidence in the truſtee; and nothing can be more baſe than to deceive a friend under the mask of friendſhip (§ 322). Hence the religious veneration paid to ſuch truſts, not only among the Hebrews, of which ſee Exod. xxii. 7. and Joſephus's antiquities of the Jews, 4. 8. 38; but among the Greeks likewiſe, and ſeveral other Pagan nations, as we may learn from the ſtory of Glaucus in Herodot. 6. 87. and from Juvenal, Sat. 13. v. 15. who there calls it *depoſitum ſacrum*. Hence it is not to be wondered, that the ancients pronounced ſuch terrible curſes againſt thoſe who dared to refuſe to give back their charge; and looked upon them as no leſs infamous, and equally to be puniſhed with thieves. See what is ſaid on this ſubject by Gundlingius in Gundlingianis, part. 2. diſſ. 8.

Sect. CCCXLV.

The duties of the truſtee.

It is plain from the definition of a *charge*, (§ 344), that the truſtee is obliged to the moſt watchful cuſtody of his charge, not ſo much as to untie it, or take it out of its cover, much leſs apply it to his uſe, without the maſter's conſent; in which caſe, the contract becomes not a charge, but contract of loan or uſe. And that the truſtee is obliged to reſtore the thing intruſted to his keeping to its owner whenever he calls for it, unleſs right reaſon diſſuade from ſo doing (§ 323); and conſequently he is not only bound to make ſatisfaction, but is likewiſe worthy of ſevere puniſhment, if knowingly and guilefully he refuſes to reſtore it, more eſpecially, if it was lodged in his truſt in a caſe of diſtreſs *.

* For becauſe regard is had to all circumſtances in imputation (§ 113), therefore ſuch a crime is ſo much the more vile and odious, in proportion as he is more inhuman, who not only cheats under the cloak of friendſhip (§ 322), but cruelly adds affliction to the afflicted. This is warmly urged by Hecuba againſt Polymneſtor, who, when Troy was deſtroyed, killed Polydorus, ſon to Priam, that he might have the gold entruſted with him to himſelf, Hecub. v. 1210, & ſeq. Euripides.

Sect. CCCXLVI.

The contract of commiſſion.

Again, the love of humanity ought to excite every one to aſſiſt another as readily as himſelf (§ 216); but becauſe one cannot be ſure of that from another, there is need of a contract, by which we may oblige one to manage our buſineſs which we have committed to him diligently, without any reward *. Now this contract we call *commiſſion*, as when one without his knowledge, undertakes another's buſineſs, or orders and manages it for him voluntarily gratis, he is ſaid *negotia gerere*, to take another's buſineſs upon him of his own accord.

* It is a true and ſolid remark of Noodt, in his probabilia, 1. 12. that a mandate or commiſſion in ancient times, had not perfect obligation, but that the proxy or perſon commiſſioned, was only bound by the laws of humanity and friendſhip, to the diligent and honeſt execution of his commiſſion: and that the ſymbol uſed was giving the hand; whence it is not unlikely that this contract was called *Mandatum*, Iſidor. orig. 4. 4. You may ſee examples of thus giving hand to proxies in Plautus Capt. 2. 3. 82. where the youth ſays,

Hæc per dextram tuam, te dextera retinens manu,
Obſecro, infidelior mihi ne ſuas, quam ego ſum tibi.

And in Terence Heaut. 3. 1. v. 84.

Cedo dexteram : porro te idem oro, ut facias, Chreme.

Anciently therefore, this whole buſineſs depended upon integrity, and not laws, till benevolence becoming very cool among mankind, neceſſity obliged them to make it a contract, that thus the proxy might be laid under a perfect obligation of executing his commiſſion diligently. And the caſe is the ſame with regard to all the other gratuitous contracts.

Sect. CCCXLVII.

The duties of a proxy.

Wherefore, ſince a proxy undertakes another's buſineſs *committed* to his care (§ 346), but it depends upon the maſter's pleaſure what, and how far to commit; it is plain, that the perſon giving the commiſſion, either gives him full power to do all as he ſhall judge proper, or circumſcribes the perſon commiſſioned within certain limits; or at leaſt, by way of counſel, ſuggeſts to him what he would have him do. In the ſecond caſe therefore, the proxy cannot exceed the bounds of his commiſſion. In the firſt, he is only obliged to anſwer for knavery. In the third, that he may expede his commiſſion by doing ſomething equivalent. But, in all theſe caſes, the procurator or proxy is obliged to render account of his management, in conſequence of the very nature of a commiſſion *.

* To this belongs that noted paſſage of Cicero, pro Q. Roſc. c. 38. "Why did you receive a commiſſion, if you was either reſolved to neglect it, or to make your own advantage of it? Why do you offer your ſervice to me, and yet oppoſe my intereſt? Get away: I will tranſact the affair by another. You undertake the burden of an office to which you think yourſelf equal: an office which does not appear heavy to thoſe who have any degree of weight or ſufficiency in themſelves. Here there is a baſe violation of two moſt ſacred things, faith and friendſhip. For one does not commiſſion another unleſs he have confidence in him, nor does one truſt a perſon except he have a good opinion of his integrity. None therefore but the moſt abandoned villain would both violate friendſhip, and deceive one who could not have been hurt had he not truſted to him."

Sect. CCCXLVIII.

As likewiſe of him who

He alſo who takes *another's buſineſs* upon him without commiſſion, without being called to do it, of his own accord, and gratis (§ 346), by ſo doing binds himſelf to manage it to the beſt advantage, and to beſtow all poſſible care about it, and therefore to render account, and to ſtand to all the loſſes that may happen by his fault.

takes another's buſineſs upon him uncalled.

* To the cauſe or author of a deed are it and all its effects imputable (§ 105). Since therefore, he who takes upon him another's buſineſs is the author of the adminiſtration (§ 346), to him are all the conſequences of the adminiſtration juſtly imputable. But the conſequences of adminiſtration are giving account and repairing damages incurred by the fault of the adminiſtrator. And therefore he who takes upon him the adminiſtration of another's buſineſs is obliged to give account, and to make reparations for damages proceeding from any fault in him. So that there is no need of deriving this obligation, with the lawyers, from feigned or preſumed conſent, ſince ſuch an adminiſtrator as hath been deſcribed, by his own deed in undertaking another's buſineſs, tacitely indeed, but truly obliges himſelf to all that hath been ſaid.

Sect. CCCXLIX.

Theſe then are the contracts which took place, money or eminent price not being yet found out: and with regard to them all, we have one thing yet to obſerve, which is, that becauſe in the three laſt, one obliges himſelf to give and do ſomething gratuitouſly, but not to ſuffer any hurt on another's account, in them therefore no one ought to ſuffer by his good offices, and conſequently he who lends is obliged to reſtore to the borrower expences that are not immoderate (§ 343), and the deponent is obliged to reſtore to the truſtee all neceſſary charges; and the perſon giving a commiſſion, or the perſon whoſe affair is undertaken and managed without his commiſſion, is obliged to reſtore neceſſary or uſeful charges; and they are all of them bound to repair all the damages that may have been incurred for their ſake, or on account of managing their affairs

The duties of a lender, a deponent, a perſon giving a proxy, and of one whoſe buſineſs is managed by another without commiſſion.

fairs by the borrower, the truſtee, the proxy, or the voluntary undertaker, without their fault *.

* We ſay thoſe damages ought to be repaired which a proxy hath ſuffered by managing another's affairs. For it is not enough that he hath incurred any accidental damage on occaſion of his having undertaken another's buſineſs: becauſe none being obliged to anſwer for accidents, a perſon giving commiſſion to another is not. Wherefore, if a proxy, while he is expeding his commiſſion, is robbed by highwaymen, or falls into a dangerous ſickneſs, the loſs he may thus providentially ſuffer is not to be imputed to his conſtituent. "For ſuch accidents, ſays Paullus, l. 26. § 6. D. mandati, are imputable to fortune, not to commiſſion." See Grotius of the rights of war and peace, 2. 14. 13. But it is otherwiſe with reſpect to one commiſſioned by a prince to do ſome public buſineſs in a foreign country. For he to whom the glory of obeying is the chief reward, ought to be indemnified by the public. See Hubert. Eunom. ad l. 26. D. mandati. Pufendorff of the law of nature and nations, 5. 4. and Hert. de lytro, 2. 10.

Sect. CCCL.

The contracts which took place after the invention of money, buying, ſelling, renting, hiring.

We now go on to another kind of contracts which began to take place when money was invented, the chief of which are *buying* and *ſelling*, *renting* and *hiring*. The firſt is a contract for delivering a certain thing for a certain price. The ſecond is a contract for granting the uſe of a certain thing or labour at a certain rate or hire. But as the *price in buying* is the value of the thing itſelf in money, ſo *hire* is the *value* of the uſe of a thing, or of labour in money; and therefore, from the very definitions, it is plain that buying and ſelling, renting and hiring, now-a-days, require payment in money, and in that are different from bartering, and the other contracts defined above; "*I give that you may give*; *I give that you may do*; *I do that you may give, and I do that you may do* *." Yet they all agree in the chief points, and have almoſt all the ſame common properties or effects.

* For tho' eſtimatory barter bears ſome affinity to buying and ſelling (§ 338), yet it really differs from it in this reſpect, that in ſelling, money intervenes, but in eſtimatory barter, an eſtimated thing is given for another thing. Whence it is very manifeſt, what ought to be determined concerning the ancient controverſy between the Sabiniani and the Proculiani, whether price in buying and ſelling could only conſiſt in money, or might conſiſt in other things. Upon which ſee, beſides the learned commentators upon § 2. de empt. vend. inſtit. V. C. Gottf. Maſcou. de ſect. Sabin. & Procul. 9. 10. 1. & ſeq.

Sect. CCCLI.

The ſeller is obliged to tell the qualities of the thing he ſells to the buyer.

Since therefore this is the nature of the contract *buying* and *ſelling* (§ 351), that a thing is delivered at a certain price; the conſequence is, that the buyer and ſeller ought equally to know the thing; and therefore the ſeller ought not only to point out to the buyer all its qualities, all its imperfections, faults or incumbrances, which do not ſtrike the eyes and other ſenſes *; but he is likewiſe bound to ſuffer him to examine it with his eyes, and by all other means; ſo that of things belonging to the taſte, the ſale is not perfect till they are taſted; and of others which ſtand in need of other trials, the ſale is not perfect till the trial hath been made: And therefore, if what Euripides ſays be true with reſpect to any contract, it certainly holds with regard to this chargeable one, "Light is neceſſary to contractors." Cyclop. v. 137.

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* There are faults and imperfections which are ſo glaring, that it would be needleſs to point them out; ſo that if one is deceived with reſpect to ſuch faults, he deſervedly ſuffers by his own blindneſs and heedleſſneſs; to which caſe belongs the conteſt between Marius Gratidianus and C. Sergius Orata in Cicero, off. l. 3. 16. But the Roman laws, that men might be more firmly bound to do this good office one to another, ordained that all the faults ſhould be told in ſelling which were known to the ſeller, and appointed a puniſhment for thoſe who hid any, or did not diſcover them. "For tho' the twelve tables, ſays Cicero,

ordered no more than this, that the ſeller ſhould be bound to make good thoſe faults, which were expreſly mentioned by word of mouth in the bargain, and which whoever denied was to pay double damages, the lawyers have appointed a puniſhment for thoſe, who themſelves do not diſcover the faults of what they ſell: For they have ſo decreed, "That if the ſeller of an eſtate, when he made the bargain, did not tell all the truth in particular, that he knew of it, he ſhould afterwards be bound to make them good to the purchaſer," de off. 3. 16. The ſame author, c. 12. diſputes, "Whether an honeſt merchant bringing, when corn was ſcarce at Rhodes, a large quantity thither from Alexandria, and withal knowing, that a great many ſhips, well laden with corn, were in the way thither from the ſame city, was bound to tell the news to the people of Rhodes, or might lawfully ſay nothing of it, but ſell his own corn at the beſt rates he could? of which queſtion ſee Grotius of the rights of war and peace, 2. 12. Pufendorff of the law of nature and nations, 5. 3. 4.

Sect. CCCLII.

Neither of the parties ought to be wronged.

Hence it is alſo plain, that equality between the thing ſold and the price paid, ought to be obſerved (§ 329); and therefore every injury ought to be repaired, whether it be done by guile or force, or be occaſioned by a juſtifiable miſtake *. Yet here we ought to call to mind what was before obſerved, that the wrong ought to be of ſome conſiderable moment, becauſe here price does not conſiſt as it were in a point, but admits of ſome latitude, and it would juſtly be reckoned being too ſharp, and opening a door to endleſs ſuits and contentions, to reſcind a contract for every ſmall loſs (§ 340).

* If it ſhould be invincible, involuntary and inculpable (§ 107): For otherwiſe, if one buys any thing at a certain price, which he hath not ſeen nor ſufficiently examined, his error ought to fall on himſelf, if the ſeller uſed no guile to deceive him, (which we know Laban did to Jacob in buying his wife, Geneſis xxix. 23.) becauſe he

ſuffers juſtly for his miſtake, who might not have miſtaken, had he not been ſupinely negligent.

Sect. CCCLIII.

To whom the loſs and gain belong before delivery.

It is diſputed to whom the *loſs* and *gain* belongs while the *thing ſold* is not delivered; whether it immediately paſſes to the buyer ſo ſoon as the price is agreed upon, or whether it ſtill belongs to the ſeller while the thing is undelivered? What the Roman law has determined in this caſe is well known; nor will any one expect that we ſhould inſiſt long upon the reaſons of that deciſion. To us, who are now only enquiring into the determination of the law of nature, it ſeems incontrovertible, that the owner or maſter is to ſtand all chances (§ 211); nor does it appear leſs certain to us, that what proceeds from delay or fault, is not mere chance; and therefore he, who by any deed damages another, is obliged to repair that damage (§ 211). Whence it follows, that becauſe the buyer may, by the law of nature, be maſter of the thing bought without delivery (§ 275), the riſk, after the ſale is compleated, immediately falls upon the buyer, unleſs the ſeller be guilty of any delay in delivering it, or ſome other fault *.

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* Pufendorff's opinion (of the law of nature, *&c.* 5. 5. 3.) is much the ſame, but more obſcurely told, where he diſtinguiſhes whether a certain day was fixed for the delivery or not, and if fixed, whether it be elapſed or not. For he thinks it moſt equal that the ſeller ſhould run the risk till the term is elapſed; but that, the term being elapſed, if the thing periſhes, it periſhes to the buyer. But ſince the buyer is maſter, by the law of nature, without delivery, and the term being elapſed, it may not be always the ſeller that is in delay, but that may often be the fault of the buyer; we think in general the risk belongs to the buyer, in whoſe power it was to have received the thing immediately, upon paying down the price. But if he hath fulfilled the conditions of the contract on his ſide, or if he is ready to fulfil them, the ſeller who delays the delivery,

deſervedly runs the risk, whether a certain term for delivery was agreed upon or not.

Sect. CCCLIV.

Whether the deciſion of the Roman law is agreeable to the law of nature?

Now, becauſe the buyer immediately becomes maſter or proprietor even before delivery, and therefore ought to ſtand to all chances (§ 353); the conſequence is, that the doctrine of the Roman lawyers concerning the riſk of a thing ſold is true, but is not ſo conſiſtent with their own principle, which denies that the dominion paſſes to the buyer without delivery; that ſince the proprietor hath the right of all the fruits, acceſſions, and other advantages of what is his own (§ 307), he hath alſo a right to all the gains of a thing ſold to him; but ſo, that this rule ſhall then only take place, if the buyer hath any way ſatisfied the ſeller for the price *; becauſe otherwiſe he would, at the ſame time, have the thing and the price, and thus he would be made richer at another's detriment (§257.)

* But not only he ſeems to have given ſatisfaction as to the price, who hath paid the money, but he alſo to whom the ſeller truſts, having, *e. g.* ſtipulated to himſelf an annual intereſt. For tho' this is the moſt ſimple kind of contract, in which the price being paid down, the thing is immediately delivered, *i. e.* if men merchandize *Græca fide*, which was the only kind of commerce Plato allowed in his commonwealth de legibus, l. 11. yet that cannot always be done, and experience ſhews us, that commerce conſiſts more in credit than in ready money.

Sect. CCCLV.

When the riſk belongs to the ſeller.

But ſince a thing juſtly periſhes to the loſs of the ſeller when he is guilty of delay in delivery, or of any other fault (353), it is manifeſt that the buyer is exempt from all riſk, if the ſeller, when he offers him the price, refuſes to give him full poſſeſſion of the thing ſold, or cannot do it; and likewiſe, if it can be proved to have been owing to the ſeller's fault or negligence, that the thing ſold periſhed either in whole or in part.

Sect. CCCLVI.

The ſeller owes warranty to the buyer.

Buying and ſelling is done on purpoſe that a thing may be delivered for a certain price (§ 278). But ſince he who transfers dominion to another for an onerous cauſe, as, for a certain price, is obliged to warranty (§ 274), the ſeller muſt be obliged to warrant the buyer, if the thing be evicted from him upon account of any cauſe antecedent to the contract; but not, if, after the ſale, ſomething ſhall then happen, on account of which one is deprived of his property, or if it be taken from him by accident, or by ſuperior force *.

* Truly, what happens by ſuperior force happens by accident; wherefore, ſince when the contract of buying and ſelling is perfected (§ 353), the owner muſt ſtand all chances, even when a thing ſold is carried off from the buyer by chance or ſuperior force, he cannot ſeek warranty or reparation from any perſon. Moreover, there is no doubt, but, as other pacts added to this contract ought to be valid; ſo the buyer and ſeller may agree that there be no warranty, but that the thing may be entirely at the buyer's risk. Such a pact was added to the ſelling of the girl by Sagariſtio in Plautus, in Perſa, 4. 4. v. 40.

> *Prius dico: hanc* Mancupio *nemo tibi dabit, jam ſcis?*
> Do. *Scio.*

Sect. CCCLVII.

Other pacts may be added to this contract.

Moreover, becauſe buying and ſelling is a contract, (§ 350); but a contract requires the conſent of both parties (§ 327), it is manifeſt, that in buying and ſelling all turns upon agreement; and therefore any other pacts may be added to it by conſent, provided they be not abſurd, unjuſt, or fraudulent; as for inſtance, *addictio in diem*,—*lex commiſſoria*,—*pactum de retrovendendo*,—*pactum protomiſeos*,—*pactum de evictione non præſtanda*,—*pactum* *de pœna in caſum pœnitentiæ præſtanda*, and ſuch others *.

* The definitions of theſe pacts are known from the civil law. *Addictio in diem*, is a pact which gives the ſeller leave to accept of any better bargain that ſhall offer itſelf by ſuch a day, which may be done two ways. Firſt, when the bargain is compleated, but upon condition that it ſhall be null, if better terms offer themſelves: Or, ſecondly, if it be only agreed, *de futuro*, that it ſhall be a bargain, if better offers are not made. *Lex commiſſoria*, makes void the bargain, if the price be not paid by ſuch a day. We have an example of it in Cornelius Nepos in the life of Atticus, c. 8. *Pactum de retrovendendo*, is an agreement, that upon tender of the price at any time, or by ſuch a certain day, the buyer ſhall be obliged to reſtore the goods to the ſeller or his heirs. Such is that ſale in Livy, 31. 13. and that in Julius Capitolin. in Marco c. 17. *Pactum protomiſeos*, is the privilege of the firſt refuſal, that is, if the buyer be hereafter diſpoſed to part with the commodity, he muſt let the ſeller, or his heirs, have the firſt refuſal, at the ſame rate he would ſell it to another. The nature of the reſt is obvious from the terms by which they are expreſſed. [*Eviction* is the loſs which the buyer ſuffers, either of the whole thing that is ſold, or of a part of it, becauſe of the right which a third perſon has to it; ſo that *pactum de evictione non præſtanda*, is an agreement between the ſeller and the buyer, that the former ſhall not be obliged to warrant the buyer againſt all danger of being evicted or troubled in his poſſeſſion of the thing ſold. Warranty being a conſequence of the contract of ſale, there is a firſt kind of natural warranty, which is called *warranty in law*, becauſe the ſeller is obliged to it by law, altho' the ſale make no mention of it. And it being in our power to augment or diminiſh our natural engagements by covenants, there is a ſecond kind of warranty, which is a warranty by deed or covenant, ſuch as the ſeller and buyer are pleaſed to regulate among themſelves. *Pactum de pœna incaſum pœnitentiæ præſtanda*, is an agreement to pay a fine, in caſe of repenting and not ſtanding to the bargain.]

Sect. CCLVIII.

As likewiſe exceptions and conditions.

From the ſame principle we infer that a ſeller may *except* ſomething for himſelf in the ſale, and that either party may add to the bargain any *condition* not repugnant to honeſty and good manners, as likewiſe appoint a day, before which the thing is to be delivered, and the price paid *. Nay, that they may alſo agree, that the price not being paid, the property ſhall remain for ſome time with the ſeller, or that the buyer, retaining ſome part of the price in his hands, for which he is to pay intereſt, may be thus ſecured againſt eviction; that acceſſions ſhall go with the principal, that ſome fixed things may be carried off, that the thing ſold ſhall be let at a certain rate to the ſeller, &c.

* Nay the ſale may be ſo agreed upon, as that a certain term of years agreed upon being run out, the thing ſold ſhall then return to the ſeller or his heirs, and yet the buyer ſhall not redemand the price paid. Eſtates are often ſold in this manner. See Pufendorff, law of nature, *&c.* 5. 5. 4.

Sect. CCCLIX.

Buying by cant or auction.

Beſides, we conclude from the ſame principle, that tho' buying and ſelling requires equality, (§ 352); yet, by the conſent of both parties, a ſale may be agreed upon which ſhall not be null on the account of any inequality whatſoever. Such are *auction*, when the price is not fixed by the ſeller, but by the higheſt of contending bidders: *emptio ſub haſta*, which is nothing elſe but a more ſolemn auction, inſtituted by public authority: *emptio per averſionem*, when things of different value are not rated ſeparately, but ſold together: and *emptio ſpei*, when the purchaſe is no certain thing, but hope and expectation only, on which, by agreement of the parties, a price is laid. In all which contracts, ſince equality is not required, by conſequence neither of the parties can complain of injury in theſe caſes, unleſs there be ſome knavery on either ſide, or the thing produced by the event was not thought of by the contracters.

* And hence we may decide the famous ſuit between the fiſhers and the Mileſian youth, who had bought the caſt of a net from them, occaſioned by the fortune of the caſt, the fiſhermen having drawn out a golden tripod in their net, each party contended this unexpected treaſure was theirs, and the oracle very abſurdly adjudged it to the wiſeſt.

De tripode ex Phœbo quæris, Mileſia pubes?
Huic tripodem addico, cui ſit ſapientia prima.

Laert. 1. 28. Val. Max. 4. 1. But it is plain that the tripod belonged to the fiſhermen, if its owner was not known (§ 324), notwithſtanding the contract, the Mileſian youth having only had regard in the contract to what fiſh ſhould be caught, and not to golden tripods, of which neither of the parties could have any thoughts. See l. 8. § 1. D. de contr. empt. l. 11. § ult. & l. 12. D. de act. empt.

Sect. CCCLX.

Of letting and hiring.

The other contract which took place after the invention of money, is *letting* and *hiring* (§ 350): For tho', according to the Roman law, in letting farms a part of the fruits was paid for the rent, which was called *quanta* *, l. 21. 6. loc. conduct. and thus this contract could take place before money was in uſe; yet there is no reaſon why it may not be referred to the contract, " *I give that you may give*;" becauſe in this caſe the uſe of the thing is not compared with money or eminent price, but with the proper or vulgar price of the fruits; and therefore the value of fruits not being always the ſame, but higher or lower according to the plenty or ſcarcity of the ſeaſon, one year the proprietor might be a loſer, and another year the tenant.

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* For if the lord of the mannor ſtipulate to himſelf a certain portion for his rent, that bargain hath the nature of partnerſhip, as will appear from the definition of theſe contracts, when we come to treat of them. Moreover, letting a fruitful farm for a certain ſhare of the fruits, is not a contract of renting and hiring, as is plain from this

conſideration, that the latter is an onerous contract, in which equality is required (§ 324); but in the former it cannot obtain. For if one ſhould ſtipulate to pay for the uſe of a farm for ſix years, every year ſo many meaſures of grain, it may happen that in one year of great plenty, when corn is very abundant and cheap, the rent ſhall be moderate, and proportioned to the uſe of the farm, but another year of ſcarcity it ſhall be immoderate on the account of ſcarcity and dearneſs. And therefore, we have already ſaid, that renting and hiring requires that the price be paid in money (§ 350).

Sect. CCCLXI.

The duties of the landlord.

Becauſe *renting* and *hiring* is a contract for the uſe of a thing, or labour at a certain rate or hire; the conſequence is, that he who lets ought to grant the uſe of a thing, or the labour contracted for, to the perſon who hires it; and therefore, if, by his fault, or by accident, it happens that he who hires cannot have the uſe of the thing hired, or cannot perform the labour promiſed, the ſtipulated hire juſtly diminiſhes in proportion *. Yea, ſometimes the leſſor may be ſued to the value; and the ſame holds, if the landlord ſhould expel, without a juſt cauſe, the tenant before his leaſe is out.

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* This equity was acknowledged by all the ancients, as by Seſoſtris king of Egypt, who, if any part of the land was waſhed away by the force of the river, ordered the rent to be proportionably diminiſhed, Herodot. l. 2. p. 81. edit. Steph. Nor did the Romans obſerve leſs equity in this affair, according to Polybius, hiſt. 6. 15. and among them Cæſar, by Sueton's relation, cap. 20. But it is manifeſt, that here likewiſe ought to be underſtood a conſiderable loſs, and not a very ſmall one, ſeeing the barrenneſs of one year is often compenſated, eſpecially in farms, by the plenty of a ſucceeding year; and it is unreaſonable that the tenant ſhould have all the advantages, and yet refuſe to bear the ſmalleſt ſhare of loſs.

Sect. CCCLXII.

And of the tenant.

In like manner it is the tenant's duty to pay in due time the ſtipulated rent, to uſe what he hath the uſe of as another's, to be returned in ſpecie, like an honeſt man, to make up damages owing to his fault; and not to deſert the farm while his leaſe is yet unexpired, unleſs he be forced to it by juſt cauſes, as the incurſion of an enemy, the fear of a plague, and other ſuch dangers. For ſince the landlord is obliged to deliver him the thing ſafe and ſound, to indemnify him, and not to turn him out before his time is expired (§ 361); it is moſt equal, that what he would not have another do to him, he ſhould not do to another; and, *vice verſa*, what he would have another do to him, that he ſhould do to another (§ 88); eſpecially ſince in this chargeable contract equality ought in juſtice to be obſerved (§ 329).

Sect. CCCLXIII.

Of pacts which may be added to this contract.

But this contract alſo depends wholly upon conſent (§ 327); and therefore it is plain that ſeveral pacts may be annexed to it, provided they be conſiſtent with good morals *; and therefore that it may be with, or without conditions, and for a certain time. And ſince tacite conſent is held for real conſent; hence we may infer, that *tacite re-hiring* is valid, if the firſt leaſe being elapſed, neither party renounces the contract; and that in this caſe it is juſt that the ſame terms ſhould take place as in the former engagement.

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* Hence it is, that eſtates are often let out on ſuch conditions that in renting and hiring very little remains of the nature of ſuch a contract. Hence perpetual leaſes, hence irregular ones, by which at once the dominion, and all hazards, are devolved upon the leſſee; of which we have an inſtance quoted from Alfenus Varus by Corn. van Bynkerſhoek, obſerv. 8. 1. & ſeq. ad legem 31. D. locati. There is ſuch a contract among the Germans, of which I

have treated Element. juris Germ. 2. 14. § 105, after Tabor, who has given us a diſſertation on this ſubject.

Sect. CCCLXIV.

Of the loan of conſumable commodities.

Now thoſe are the contracts which began to take place after money was in uſe; we are therefore, in the next place, to conſider thoſe contracts which could have place either before or after money was found out. The chief of which is the contract of loan, *mutuum*; by which we underſtand granting the uſe of conſumable things, on condition that as much ſhall be reſtored in kind *. For ſince not only money, but every conſumable commodity may be credited in this manner, it is plain that this contract had place before men had acknowledged money for a common meaſure of things, and it is now moſt frequent.

* We call thoſe conſumeable things which we can number, meaſure or weigh. And this is the nature of them, 1. That they cannot be uſed without being abuſed or conſumed. 2. That they may be returned either in kind or in ſpecies, l. 2. § 1. D. de rebus cred. *i. e.* if I owe a hundred guineas, my creditor will own himſelf ſatisfied whether I return him the ſame guineas I received from him, or others of the ſame kind. And hence it is plain what is meant by the ſame kind: it means the ſame in quantity and quality. But thence follows another property of conſumeable commodities. 3. *viz.* That with reſpect to them as much is the ſame, Nor, 4. do they (as Thomaſius has obſerved de pretio adfect. in res fung. non cad.) admit of a price of fancy, unleſs they be very ſcarce, ſo that as much in kind cannot eaſily be found. Thus, tho' at Rome Falernian wine was a conſumeable commodity, yet a price of fancy fell upon Trimalchion's Opimian wine of a hundred years old, Petronius Arbit. Satyric. cap. 34.

Sect. CCCLXV.

The dominion of the thing credited is transferred to the debtor.

It is plain, from the definition of this contract, (§ 364), that the debitor has the power of abuſing the thing credited to him; and therefore the creditor has abdicated his right of excluding the debtor from the uſe of it; and thus he hath, only upon condition of receiving as much from the debtor, transferred to him all his right; but to transfer the right of excluding others from the uſe of a thing, is to transfer dominion (§ 231); wherefore this contract is an alienation, by which the dominion of the things credited paſſes intirely to the debtor.

* It is well known what a buſtle Alexius a Maſſalia, *i. e.* Claudius Salmaſius, has made about this affair, endeavouring to turn the defenders of this Theſis into ridicule. But all his weapons borrowed from the civil law, and much ſtronger ones, have been turned againſt him by Wiſſenbachius, Fabrottus, and other learned men, inſomuch that the ſubject is now exhauſted. But the principles here laid down ſhew, that right reaſon is not againſt the Civilians in this matter, and does not favour Salmaſius. It is true that the creditor does not alienate the quantity, but preſerves it ſafe to himſelf, by obliging the debtor to return him the ſame in kind: But the dominion of the ſpecies credited, and all the risks, paſs undoubtedly to the debtor, as Salmaſius himſelf, being puſhed to the utmoſt extremity, is forced by his adverſaries to own.

Sect. CCCLXVI.

The debtor's obligation.

From the ſame definition we infer, that the debtor is obliged to return as much, not only in quantity, but in quality; and therefore, if it be money that is lent to him, and its intrinſic value ſhould afterwards be augmented or diminiſhed, regard is to be had to the time when the contract was made; and accordingly ſo much ought to be diminiſhed as the money has roſe, or ſo much ought to be added as the money has fallen. Moreover, the debtor ought not to delay paying; nor is he delivered from his obligation by the periſhing of the conſumeable commodity he received from his creditor, nor by any accidental event *.

* For ſince the dominion of a conſumeable commodity is transferred to the debtor (§ 365), but he who has the dominion muſt ſtand chances (§ 211), the creditor cannot be freed from his obligation, if, *c. g.* the wine lent him ſhould turn into vinegar, or the money lent ſhould be ſtoln from him, or be loſt by any other accident. Much leſs then will poverty excuſe a debtor from payment, if he has ſquandered away his eſtate, or, like an idle drone, lives at another's expence, and wantonly conſumes on his pleaſures the gains of another's ſweat and labour. For this is a moſt peſtiferous race, ready to engage in the vileſt ſchemes. And they who have waſted their own ſubſtance muſt needs covet that of others. See Saluſt. Catil. cap. 20.

Sect. CCCLXVII.

Whether uſury be allowable by the law of nature?

But tho' this contract be in its nature gratuitous, (as well as commodatum, of which above, *i. e.* loan of not conſumeable things); yet the love of mankind waxing cold, it hath become cuſtomary for creditors to ſtipulate a reward to themſelves for what they lend to their debtors; which, if it conſiſt in paying monthly or yearly a certain proportion of the ſum lent, as 3, 4, or 5 per cent. it is called *intereſt* or *uſury*, tho' that laſt term is often taken in a bad ſenſe for exorbitant intereſt, by which creditors reduce their debtors to the laſt dregs. Concerning uſury, it is a celebrated queſtion, that has been ſeverely agitated by learned men, whether it be agreeable to the law of nature for creditors to ſtipulate with debtors for it.

* We need not inſiſt long upon the hiſtory of this controverſy, which was revived in Holland the laſt century. We are ſaved this labour by Noodt de fœnore & uſuris, 1. 4. Martinus Schook exercit. var. p. 430. and Thomaſ. not. ad Lancellot. 4. 7. not. 275. p. 2024. the laſt of whom hath given us a full hiſtory of the riſe of this diſpute, and of the managers on both ſides of the queſtion. It muſt however be acknowledged, that moſt of the learned who have wrote upon this ſubject have been more taken up about the divine poſitive law than the law of nature;

ſo that very little advantage is to be reaped from them by ſtudents of natural law.

Sect. CCCLXVIII.

What is to be affirmed here.

But ſince, 1. It is not unjuſt to communicate our goods with others, not gratuitouſly, but for a hire (§ 328). 2. Since one often makes great gain by the uſe of another's goods, while, in the mean time, the creditor ſuffers loſs or inconvenience by the want of them; but none ought to inrich himſelf at the detriment of another (§ 257). 3. Beſides, ſince he runs a great riſk who lends his goods to another on theſe terms, that he may conſume or abuſe them, it is not unreaſonable that the creditor ſhould exact a hire from the debtor in proportion to the riſk (§ 331).—From all theſe conſiderations, we think it may be juſtly concluded, that a pact about intereſt with one who may make gain of our money, is not contrary to the law of nature *. And tho' intereſt ought to be proportioned to the gain which the debtor may, in all probability, make of the ſum; yet it is not iniquous that it ſhould be augmented in proportion to the riſk, the ſcarcity of money, and other circumſtances (§ 331), as the cuſtom of *bottomry* ſhews us, dig. l. 22. tit. 2. de nautico fœnore.

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* To this doctrine it is in vain objected, as, 1. "That money is a barren thing, and therefore that uſury, as a kind of offspring, ought not to be required for it." For it is a barren thing in a phyſical ſenſe, but not in a civil ſenſe; for in commerce the double, and very often more, is gained by it, Mat. xxv. 16. 17. Or, 2. "That loan of inconſumeable things is gratuitous, and therefore loan of conſumeable goods ought to be ſo too." For he who lends an unconſumeable thing ſuffers leſs inconvenience, and runs leſs risk than a creditor who transfers to his debtor the dominion of a conſumeable thing, with the power and right of abuſing it. Or, 3. That God hath prohibited ſuch pacts, Exod. xxii. 25. Lev. xxv. 37. Pſalm xv. 5. Luke vi. 34." For God proſcribed ſuch

pacts from the Iſraelitiſh common-wealth, ſo far only that an Iſraelite could not exact intereſt from an Iſraelite; they were permitted with ſtrangers, Deut. xxiii. 19. 20. But the law of nature makes no difference between fellow citizens and ſtrangers. See Jo. Selden de jure nat. & gent. See Heb. and Jo. Cleric. ad Exod. xxii. 25. p. 112.

Sect. CCCLXIX.

What is meant by pledge, mortgage, and in antichretic pact.

Another contract of this kind is *pawn* or *pledge*, by which we underſtand an obligation to deliver ſomething to a creditor for the ſecurity of what he lends or credits. For if a thing, eſpecially if it be in its nature immoveable, be not delivered, but yet the creditor hath a right conſtituted to him in it, of taking poſſeſſion of it, in caſe the debt be not cancelled, that tranſaction between the creditor and debtor is called *hypotheca*, *mortgage*. Again, if it be agreed that a creditor ſhould receive the fruits of a thing delivered to him for the ſecurity of what he hath credited, in lieu of intereſt, this invention is termed *pactum antichreticum* (§ 283.)

Sect. CCCLXX.

What is juſt about a pawn.

From the definition of a *pawn*, it is plain that it ought to be the debtor's own; and therefore he deſerves puniſhment who pawns any thing belonging to another, whether lent to him, depoſited with him, or hired by him. That the creditor ought not to uſe a pawn, if it may be rendered worſe by uſe, but to preſerve it with as much care as his own goods, and to return it to the debtor, when the debt is cleared. Finally, ſince the owner regularly runs riſks * (§ 211), the conſequence is, that the riſk of the pawn belongs to the debtor, and that periſhing by accident, he is notwithſtanding obliged to pay his debt.

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* By the law of Germany in the middle ages, when a pawn periſhed by chance, the debtor was freed from all obligation to pay his debt, jus prov. Sax. 3. 5. Sometimes

it was provided by a ſpecial pact, that the risk ſhould belong to the creditor, as in Pontan. hiſt. Dan. l. 9. ad annum 1411. But becauſe that proceeded from this ſingular principle of the Germans, that the creditor got the dominion of the pawn, of which ſee our Elem. jur. Germ. l. 2. 11. §. 319. the reaſons given in this ſection do not permit us to attribute theſe things to the law of nature.

Sect. CCCLXXI.

What is juſt about mortgage.

From the definition of *mortgage* (§ 369), we infer, that it can ſcarcely conſiſt in moveables, which a debtor may eaſily alienate and transfer to a ſtranger without his creditor's knowledge; but it conſiſts chiefly in immoveables, as houſes, lands, cities and territories *; and likewiſe in larger ſtocks of moveable things, which are not eaſily tranſported from place to place, as large libraries; yea, in rights and actions likewiſe, if great advantage accrue from them to the poſſeſſor. But whatever is thus pledged to a creditor, his right in it continues, to whomever it may be transferred; for otherwiſe his *hypotheca* would be without effect.

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* This we add on account of what Puſendorff ſays of the law of nature, *&c.* 5. 10. 16. "In the ſtate of nature ſuch mortgages are needleſs; for if the debtor refuſes payment, the poſſeſſion of the mortgage aſſigned in ſecurity, muſt be detained by force of arms. But in that ſtate, even without ſuch a particular aſſignment, it is lawful to ſeize on any thing that belongs to the debtor." But examples of ſuch mortgages are not wanting even among independent nations, as Hertius has ſhewn in his notes upon this paſſage of Puſendorff, p. 738. & ſeq. who elegantly replies to Puſendorff's argument, that this mortgage may be of great uſe, if the town thus pledged ſhould fall into a third perſon's hands. Moreover, we readily grant, that independent nations do not raſhly ſatisfy themſelves with ſuch ſimple mortgages, but do at leaſt ſtipulate the right of keeping a gariſon in theſe cautionary towns, as Elizabeth queen of England did in the 1585, when the Hollanders put ſeveral towns into her hands, Em. Meteran. Rer. Belg. l. 13. and the other Belgic annaliſts for that year.

Sect. CCCLXXII.

What is juſt about the pactum antichreticum.

From the definition of the *pactum antichreticum,* (§ 369), it is obvious that it can only take place in pawning things which yield increaſe; and ſince the fruits are in lieu of intereſt, they ought not greatly to exceed that meaſure of intereſt which we have found to be moſt agreeable to equity. The creditor, in this caſe, is not liable to accidents, unleſs it be ſo agreed; and therefore if the creditor, on account of barrenneſs, or any public calamity, does not receive the value of the intereſt due to him, the debtor is obliged to make it up.

Sect. CCCLXXIII.

What is common to all theſe conventions.

This is in common to all theſe contracts, that being deſigned for the ſecurity of the creditor, (§ 369), the creditor, if the debtor be tardy in his payment, has a right to alienate the pawn or mortgage, and deducting his principal and intereſts, is obliged only to refund the overplus to the debtor, unleſs there be an acceſſory pact, *lex commiſſoria*; by which it is ſtipulated, that the pawn, if not relieved within a certain time, ſhall be left to the creditor for his principal and intereſts. For tho' the more recent Roman laws did not allow of ſuch a pact *, l. un. C. Theodoſ. de commiſſor. reſcind. l. ult. C. de pact. pign. and that might have been juſtly done on account of the exorbitant avarice of creditors; yet it does not follow from hence, that the law of nature, which permits every owner to alienate his own on whatſoever conditions, does not allow of ſuch a pact (§ 309), which Hertius hath ſhewn, by many examples, to have been in uſe amongſt princes and independent nations, in his notes upon Pufendorff, 5. 10. 14. p. 737.

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* The more ancient laws among the Romans adhering more ſtrictly to the ſimplicity of the law of nature, are not contrary to this commiſſory pact; yea, while the re-

public was yet free, it was looked upon as lawful, as appears from a paſſage in Cicero's epiſtles, epiſt. ad famil. 13. 56. quoted by Hertius, and before him by Jac. Gothofred. ad l. un. Theodoſ. de commiſſ. reſcind. (Philotes Alabandenſes ὑποθήκας Cluvio dedit : hæ commiſſæ ſunt). But the terrible ſeverity of creditors, by which debtors were unmercifully ſqueezed, being forced to pawn, in this manner, things of much greater value than the debt, at laſt obliged the emperors to proſcribe this pact, as exceeding detrimental to debtors.

Sect. CCCLXXIV.

Of ſuretyſhip.

The third contract which may take place before and after money is invented, is *ſuretyſhip* ; *i. e.* an obligation a perſon comes under to pay another's debt, if he does not. For if one binds himſelf not merely to pay, the other failing, but conjointly with him *in ſolidum* for the whole debt, he is debtor, and the obligation of both is equal. Again, he who, with the conſent of the creditor, delivers a debtor from his obligation, and takes it upon himſelf, is called *expromiſſor*, *Bail.* All theſe contracts, as well as that of pawn or mortgage, are contrived for the ſecurity of creditors, and afford an ample proof of the decay of benevolence among mankind *.

Sect. CCCLXXV.

For what things it is lawful to be ſurety.

Moreover, from the definition of *ſuretiſhip*, (§ 374), it is plain that there is no place for ſuretiſhip, which is a ſubſidiary ſecurity, unleſs the debt be ſuch that it may be as conveniently paid by another as by the principal debtor; and therefore ſuretiſhip for condemned perſons, tho' ſome antient nations admitted it, is contrary to right reaſon *. But yet there is no reaſon, when the crime may be expiated by a mulct, why another perſon may not interpoſe in behalf of the criminal, and oblige himſelf to pay the mulct, if the criminal fail.

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* For if benevolence prevailed, as it ought to do, among mankind, a creditor would not diſtruſt a debtor, nor would a debtor allow one thought of defrauding his creditor to enter into his mind ; and thus there would be no occaſion for pawns or ſureties. But now that men are become ſo ſuſpicious and diffident, that they will not believe unleſs they ſee, this is an argument of the decline of benevolence, and of the prevalence of perfidy among men. This is allowed by Seneca in a moſt beautiful paſſage (of benefits, 3. 15).

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* Puſendorff, 5. 10. 12. hath brought many inſtances of it among the Greeks; and Hertius in his notes on Puſendorff, ibidem, p. 735, produces ſtatutes approving of ſuch ſureties. But as for others who pretend to juſtify this kind of ſuretiſhip by examples in the ſacred writings, they are eaſily refuted, Gen. xlii. 37. For every one may perceive that obligation of Reuben to have been fooliſh, eſpecially ſeeing he did not pledge his own head, but the lives of his innocent children; and beſides, it was not for a condemned perſon, but for his brother Benjamin's return out of Egypt. Whence it is not probable that the pious and prudent Jacob accepted of the offered ſecurity, Gen. xliii. 9. Juda offers ſecurity, but not for a condemned criminal, nor does he pledge his life. Finally, 1 Kings, xx. 39. there no perſon pawns his life for a guilty criminal, but the cuſtody of a captive is demanded under the peril of death. So that there is nothing in the ſacred writings to juſtify this cuſtom among the ancients.

Sect. CCCLXXVI.

The obligation of ſureties.

As to the obligation of ſureties, it is plain, from the definition (§ 374), that they oblige themſelves to the ſame which the creditor has a right to exact from his debtor, and therefore it is unjuſt for a creditor to ſtipulate more to himſelf from a ſurety than from the debtor; that the obligation of a ſurety is ſubſidiary, and therefore that by the law of nature a ſurety does not ſtand in need of the *ſingulari beneficio ordinis vel excuſſionis*, as it is called in the civil law; but may then be ſued, when it clearly appears that the principal debtor has not wherewith to pay *. Many ſureties engaged for the ſame perſons and debts, are only bound proportionably, unleſs they have voluntarily and expreſly bound themſelves for the whole; and therefore the benefit of diviſion is due to them by the law of nature, as being proportionably bound, unleſs one's fellow-ſureties be inſolvent, and one could not but know they were ſo.

* A contrary opinion hath prevailed in many nations, who thought that recourſe might be had to the ſurety before the principal debtor. Concerning the Hebrews, ſee Prov. xx. 16. xvii. 18. As for the Greeks, that ſaying of Thales is well known, " Be ſurety, and ruin is at your heels." The ancient Germans had likewiſe ſuch a proverb. See Schilt. Exercit. 48. 21. The ſame rigour was alſo obſerved by the Romans, till Juſtinian introduced the beneficium ordinis vel excuſſionis, novella 4. But ſince a ſurety only accedes as a ſubſidiary ſecurity on failure of the principal, if he might be immediately ſued, there would be no difference between the Surety, the Expromiſſor or Bail, and the Principal debtor. It is therefore agreeable to right reaſon, that he who is bound as a ſubſidiary ſecurity, ſhould not be ſued before the diſcuſſion of the principal debtor. So Cicero Epiſt. ad Attic. 16. 15. " Sponſores adpellare, videtur habere quamdam δυσωπίαν."

Sect. CCCLXXVII.

Of the ſolidity among two or more debtors.

When two or more become debtors of one and the ſame *thing* (§ 374), it is evident, that every one of them being obliged to the creditor for the whole debt, the creditor may exact the whole debt from either of the two he pleaſes *; and when any one of them pays the debt, the other is diſcharged from his obligation to the creditor, but not with reſpect to his fellow-ſurety; for he who paid for him (§ 346) did his buſineſs, and therefore ought to be indemnified by him (§ 349).

There is therefore no place here for the diviſion of an obligation. But becauſe if both who are bound in ſolidity be ſolvent, and both may eaſily be ſued, there is no juſt cauſe why the creditor ſhould preſs one, and extort the whole ſum from him alone; humanity does not allow one ſo rigorouſly to proſecute his right, as to preſs any one ſingly, but commands us to have recourſe to both. For ſurely humanity doth not permit us to demand any thing from any other which we can obtain otherwiſe, without detriment to ourſelves or any other (§ 216).

Sect. CCCLXXVIII.

As to an expromiſſor or bail.

Again, from the definition of an *expromiſſor* or *bail* (374), we infer, that his obligation is the ſame with that of the principal debtor, inſomuch that the latter, bail being accepted by the creditor, is free; and therefore neither can this kind of ſurety plead the diſcuſſion of the principal debtor before him; nor can the creditor, if he cannot recover his debt from this ſurety, any more have recourſe to the principal debtor whom he hath once freed, but he muſt depend upon this ſurety alone for it, upon whoſe faith he had relieved his debtor.

Sect. CCCLXXIX.

The contract of partnerſhip.

The next contract which may take place either where money is, or is not in uſe, is *partnerſhip*, as it may plainly do, ſince it is nothing elſe but ſharing among many the profit or loſs that may ariſe from joint ſtock or labour *: for commodities and labour may be communicated either before or after money is in uſe.

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* We are therefore here treating of community in conſequence of the conſent of partners. But becauſe conſent may be either tacit or expreſs, and both have the ſame effect (§ 275), the conſequence is, that partnerſhip may be contracted by tacite conſent, *i. e.* by deed, Hert. diſſ. de ſocietate facto contr. Now, ſince either all goods and labour, or a certain ſhare only, or ſome particular goods and labour, may be joined, partnerſhip may be either univerſal, or general, or particular. Grotius of the rights of war and peace, 2. 12. 24. hath juſtly remarked, that univerſal and general partnerſhip have ſomething of chance in them; but that

in particular or ſingular partnerſhip, equality ought to be obſerved.

Sect. CCCLXXX.

What is juſt with reſpect to partnerſhip.

Becauſe in *univerſal* partnerſhip all things, in *general* partnerſhip ſome things only are common; ſo that theſe contracts ſomewhat depend upon chance (§ 379); the conſequence is, that amongſt ſuch partners the loſs and gain muſt be common, but the contribution may be very unequal; and therefore ſuch a partner hath no reaſon to complain if his fellow-partner expends more than him, when his neceſſities require it; yea, a partner is obliged to pay his proportion of debt contracted by his fellow-partner; for which reaſon, it cannot be doubted that it is highly reaſonable that every one of ſuch partners ſhould ſhare of the gain made by any one of them; and that he who has a right to the gains, ought to bear his ſhare of the loſs, damages, or inconveniencies.

Sect. CCCLXXXI.

What in ſingular partnerſhip.

But ſince in *ſingular* or particular partnerſhip equality ought to be obſerved (§ 380), which however is not always obſerved in the contribution; it follows, that the equality in dividing loſs and profit cannot be *arithmetical*, but muſt be *geometrical**. And therefore he who hath contributed more ſtock or labour, ought to have a proportionably greater ſhare of profit and loſs than he who contributes leſs. But ſeeing any one can grant to any other whatever advantages he pleaſes with regard to his own goods (§ 309), it is undeniable that partners may agree one with another in any manner; and may obſerve, in dividing loſs and gain, either arithmetical equality, or any inequality, unleſs, by the knavery of one or other of them, the diviſion degenerates into that of the lion in the fable, Phæd. Fab. 1. 6.

* Some have ſaid, that arithmetical equality ought to be obſerved here, as among brethren; and thus they interpret, l. 6. l. 29. l. 80. D. pro Soc. and other Roman laws, Connan. Comment. jur. civ. 7. 19. 5. Huber. Prælect. ad tit. Inſt. de ſocietate. But this fraternity of partners is a fiction, to which the law of nature is a ſtranger; and beſides, in this caſe the profit ariſes from joint ſtock and labour; wherefore, nothing can be more juſt than that loſs and gain ſhould be ſhared proportionably to ſtock and labour. So Ariſtotle rightly decides the matter, ad Nicom. 8. 16.

Sect. CCCLXXXII.

Whether one partner may quit the partnerſhip againſt the other's will?

In fine, ſince partnerſhip is formed by conſent, and by way of convention (§ 379), this rule of the Roman law can hardly be deduced from the principles of the law of nature, *viz.* "That any one may quit partnerſhip, provided he do it not fraudulently, nor at an improper time *." The whole matter rather turns upon the conditions of the agreement; and therefore, if the partnerſhip was contracted for perpetuity, it ought to be perpetual; if for a time only, it is but for the time fixed; unleſs one of the partners be injurious to the others, and do not fulfil the articles of agreement; in which caſe, it is moſt juſt that the others ſhould have the right of renouncing the partnerſhip even before the time agreed upon in the contract.

* This may be proved from the very reaſons brought by ancient lawyers. For ſometimes they give this reaſon, "That community is the mother of diſcords, l. 77. § 20. D. de legat. Sometimes they ſay, "It is a natural vice to neglect what is in common, l. 2. C. quando & quibus quarta pars. To which ſome add another reaſon, "That reſpect is had in the choice of a partner to his abilities and induſtry; and therefore, if either partner does not anſwer his co-partner's hope and expectation, with regard to his honeſty and diligence, the other hath a right to renounce the partnerſhip." But buying and ſelling, renting and hiring often produce as much diſcord, in which contracts they allow no place for changing one's mind, or repenting.

And houſes let, are often no leſs neglected than houſes in common to many, and yet it is not allowable to break ſuch a contract before the time is out. Again, he who hires one to work for him, hath regard to the skill, honeſty and induſtry of the perſon he hires, and yet he cannot break his contract before the time is expired. If therefore this rule takes place in other contracts, why may it not be allowed to take place likewiſe in partnerſhip, l. 5. C. de obl. & art. " As every one is at liberty to contract or not contract, ſo none can renounce the obligation he hath once come under, without the conſent of his party."

Sect. CCCLXXXIII.

Of donation.

Let us add *donation*, by which we underſtand a promiſe to transfer ſomething of ours to another gratuitouſly. From which definition, it is plain that it may be made with or without conditions; and therefore in view of death. So that *donations* are juſtly divided into *donations among the living*, and *donations in proſpect of death*. And a donation among the living obliges to deliver the thing promiſed, and leaves no room to the donor to revoke his promiſe. But from what was ſaid above, it is evident, that he who receives the donation cannot demand warranty from the donor, if the thing be evicted (§ 274), and that he is obliged to ſhew gratitude to his benefactor by words and deeds on all occaſions (§ 222).

Sect. CCCLXXXIV.

Some corolaries about contracts in general.

To conclude; with regard to all contracts in general, it is to be obſerved, that becauſe they conſiſt in conſent (§ 327), they can only be formed by thoſe who are not incapable, by nature or by law, of conſenting. Again, becauſe they were deviſed for the ſake of commerce (§ 327), they muſt be about things which may be in commerce honeſtly, and with the permiſſion of the laws; and therefore contracts about impoſſible or baſe things, or things exeemed by the laws from commerce, are null:

but as many things are exeemed by poſitive laws from commerce, which naturally are ſubjects of it, ſo poſitive laws may likewiſe permit contracts about ſeveral things which are not ſubjects of commerce, according to the laws and manners of other nations *.

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* For example, with us it is baſe and to no purpoſe to pawn dead bodies. But the laws of the Egyptians permitted pawning of dead bodies, and denied burial to children if they neglected to relieve ſuch pledges by paying their parents debts, Diod. Sicul. Bibl. I. 93. On the other hand, it is unnatural and abominable to pawn wives and children, as was permitted in the kingdom of Pegu, becauſe it muſt be attended with moſt miſerable conſequences. And therefore the Romans judged him worthy of baniſhment, who knowingly accepted in pawn a free-born child from his father, l. 5. D. quæ res pign.

REMARKS on this chapter.

It ſeems neceſſary to add a little to what our Author hath ſaid in this chapter concerning uſury, to ſhew at one and the ſame time, the true ſtate of the caſe with regard to the forbidding of uſury in the Iſraelitiſh commonwealth, and how civil laws may confine and alter natural rights, conſiſtently with the law of nature. And here all we have to do is to copy a little from our excellent politician Mr. Harrington, in his prerogative of popular government (p. 245.)

Mr. Harrington, who hath ſhewn at great length, that property muſt have a being before empire or government, or beginning with it muſt ſtill be firſt in order, becauſe the cauſe muſt neceſſarily precede the effect, reaſons thus: " Property comes to have a being before empire two ways, either by a natural or violent revolution: natural revolution happens from within, or by commerce, as when a government erected upon one balance, that for example, of a nobility or a clergy, through the decay of their eſtates, comes to alter to another balance; which alteration in the root of property, leaves all to confuſion, or produces a new branch or government, according to the kind or nature of the root. Violent revolution happens from without, or by arms, as when upon a conqueſt there follows confiſcation. Confiſcation again is of three kinds, when the captain taking all to himſelf, plants his army by way of military colonies, benefices or Timars, which was the policy of Mahomet; or when the captain has ſome ſharers, or a nobility that divides with him, which was the policy introduced by the Goths and Vandals; or when the captain divides the inheritance, by lots or otherwiſe, to the whole people; which policy was inſtituted by God or Moſes in the commonwealth of Iſrael. Now this triple diſtribution, whether from natural or violent revolution, returns, as to the generation of empire, to the ſame thing, that is, to the nature of the balance already ſtated." Mr. Harrington having fully proved theſe points, or that property is the natural cauſe of government, and that changes in it muſt make proportional changes in government, it follows from hence, that unleſs the balance of property be fixed, empire or government cannot be fixed, but will be continually altering as the balance of property varies; but property in land can only be fixed by an Agrarian law. Now theſe principles being laid down, the following truths concerning money, and the methods of regulating it in governments will be manifeſt, namely, "That the balance in money, as Mr. Harrington expreſſes it, may be as good or better than that of land in three caſes: Firſt, where there is no property of land yet introduced, as in Greece during the time of her ancient imbecility; whence, as is noted by Thucydides, *The meaner ſort, through a deſire of gain, underwent the ſervitude of the mighty.* Secondly, in cities of ſmall territory and great traffic, as Holland and Genoa, the land not being able to feed the people, who muſt live upon trade, is over-balanced by the means of that traffic, which is money. Thirdly, in a narrow country, where the lots are at a low ſcantling, as among the Iſraelites; if care be not had of money in the regulation of the ſame, it will eat out the balance of land. For which cauſe, tho' an Iſraelite might both have money, and put it to uſury, (Thou ſhalt lend [upon uſury] to many nations, Deut. xv. 6. and xxiii. 19.) yet might he not lend upon uſury to a citizen or brother. Whence two things are manifeſt. Firſt, that uſury in itſelf is not unlawful: And next, that uſury in Iſrael was no otherwiſe forbidden, than as it might come to overthrow the balance or foundation of the government. For where a lot, as to the general, amounted not perhaps to four acres, a man that ſhould have a thouſand pounds in his purſe, would not have regarded ſuch a lot in compariſon of his money; and he that ſhould have been half ſo much in debt, would have been quite eaten out. Uſury is of ſuch a nature, as, not forbidden in the like caſes, muſt devour the government. The Roman people, while their territory was no bigger, and their lots, which exceeded not two acres a man, were yet ſcantier, were flead alive with it; and if they had not helped themſelves by their tumults, and the inſtitution of their tribunes, it had totally ruined both them and their government. In a commonwealth whoſe territory is very ſmall, the balance of the government being laid upon the land, as in Lacedemon, it will not be ſufficient to forbid uſury; but money itſelf muſt be forbidden. Whence Lycurgus allowed of none, or of ſuch only as being of old or uſeleſs iron, was little better, or if you will, little worſe than none. The prudence of which law appeared in the neglect of it, as when Lyſander, General for the Lacedemonians in the Peloponneſian war, having taken Athens, and brought home the ſpoil of it, occaſioned the ruin of that commonwealth in her victory. The land of Canaan, compared with Spain or England, was at moſt but a Yorkſhire, and Laconia was leſs than Canaan. Now, if we imagine Yorkſhire divided, as was Canaan, into ſix hundred thouſand lots, or as was Laconia into thirty thouſand, a Yorkſhireman having one thouſand pounds in his purſe, would I believe, have a better eſtate in money than in land: Wherefore, in this caſe, to make the land hold the balance, there is no way but either that of Iſrael, by forbidding uſury, or that of Lacedemon, by forbiding money. Where a ſmall ſum may come to over-balance a man's eſtate in land; there, I ſay, uſury or money, for the preſervation of the balance in land, muſt of neceſſity be forbidden, or the government will rather reſt upon the balance of money, than upon that of land, as in Holland and Genoa. But in a territory of ſuch extent as Spain or England, the land being not to be overbalanced by money, there needs no forbidding of money or uſury. In Lacedemon merchandize was forbidden; in Iſrael and Rome it was not exerciſed; wherefore, to theſe uſury muſt have been the more deſtructive; but in countries where merchandize is exerciſed, it is ſo far from being deſtructive, that it is neceſſary; elſe that which might be of profit to the commonwealth, would ruſt unprofitably in private purſes, there being no man that will venture his money but through hope of ſome gain; which, if it be ſo regulated, that the borrower may gain more by it than the lender, as at four in the hundred, or thereabouts, uſury becomes a mighty profit to the public, and a charity to private men: In which ſenſe, we may not be perſuaded by them, that do not obſerve theſe different cauſes, that it is againſt ſcripture. Had uſury to a brother been permitted in Iſrael, that government had been overthrown: But that ſuch a territory as England or Spain cannot be over-balanced by money, whether it be a ſcarce or plentiful commodity, whether it be accumulated by parſimony, as in the purſe of Henry VII. or preſented by fortune, as in the revenue of the Indies. For in general this is certain, that if the people have clothes and money of their own, theſe muſt either riſe (for the bulk) out of property in land, or at leaſt, out of the cultivation of the land, or the revenue of induſtry; which, if it be dependent, they muſt give ſuch a part of their clothes and money to preſerve that dependence, out of which the reſt ariſes, to him or them on whom they depend, as he or they ſhall think fit; or parting with nothing to this end, muſt loſe all; that is, if they be tenants, they muſt pay their rent, or turn out. So if they have clothes or money dependently, the balance of land is in the landlord or landlords of the people. But if they have clothes and money independently, then the balance of land muſt be in the people themſelves, in which caſe they neither would, if there were any ſuch, nor can, becauſe there be no ſuch, give their money or clothes to ſuch as are wiſer, or richer or ſtronger than themſelves. So it is not a man's clothes and money or riches, that oblige him to acknowledge the title of his obedience to him that is wiſer or richer, but a man's no clothes, or money, or his poverty. Wherefore, ſeeing the people cannot be ſaid to have clothes and money of their own, without the balance in land, and having the balance in land, will never give their clothes or money or obedience to a ſingle perſon, or a nobility, tho' theſe ſhould be richer in money, in ſuch a territory as England or Spain, money can never come to overbalance land. Henry VII. tho' he miſſed of the Indies, in which, for my part, I think him happy, was the richeſt in money of Engliſh princes. Nevertheleſs, this acceſſion of revenue did not at all preponderate on the king's part, nor change the balance. But while making farms of a ſtandard he increaſed the yeomanry, and cutting off retainers he abaſed the nobility, began that breach in the balance of land, which proceeding ruined the nobility, and in them that government. The monarchy of Spain, ſince the ſilver of Potoſi ſailed up the Guadalquiver, which in Engliſh is, ſince that king had the Indies, ſtands upon the ſame balance in the lands of the nobility on which it always ſtood." See Mr. Harrington himſelf. What hath been now quoted from him is ſufficient to ſhew in what manner we ought to reaſon about the regulation of money in a ſtate. There will be occaſion afterwards to conſider the natural cauſes of government more fully. But it is plain from what was ſaid in a former remark, 1. That ſuperior wiſdom and virtue will naturally create authority. And that, 2. Property alone can give or create power, and will naturally produce it. And therefore, 3. That empire will follow the balance of property: And by conſequence, 4. There is no natural mean of fixing government, but by fixing the balance upon which it depends. Wherefore, 5. That is a proper regulation of money with reſpect to the preſervation of a government, which is neceſſary or proper to fix the balance upon which the nature of that government depends or turns. But, 6. Men have a natural right to form themſelves into any form of civil government proper to promote their greater happineſs; and conſequently, to make any regulations neceſſary or proper to that effect. Thus the Lacedemonians had a right, for the preſervation of their government, to forbid money, and the Iſraelites to forbid uſury. And thus our government has a right to regulate the intereſt of money as the nature and end of our government, *i. e.* as the greater good in our government requires. If it be aſked what the law of nature ſays about money in a ſtate of nature, the anſwer is obvious; it requires that commerce be carried on with or without money, in an honeſt candid way; ſo as none may be made richer at the detriment of others; and allows bartering, buying, letting and hiring, and other contracts, all imaginable latitude or liberty within the bounds of honeſty, the general dictates of which, with regard to all contracts, are ſufficiently explained by our Author.

CHAP. XIV.

Concerning pacts.

Sect. CCCLXXXV.

The difference between pacts and contracts.

THO', by the law of nature, there be no difference between *pacts* and *contracts*, both deriving their ſubſiſtence and force from conſent; yet it may be ſaid, that *contracts*, according to the antient way of ſpeaking, related to commerce about goods and labour (§ 327); and *pacts* to other things and deeds, which are not matters of ordinary commerce *. Thus, *e. g.* tho' free perſons of either ſex are not in commerce, yet among them agreements are made about marriage, to be celebrated either immediately, or ſome time after; and both theſe agreements, the former of which is called *betrothing*, the other *full marriage*, come under the title of *pacts.*

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* Puſendorff, law of nature, *&c.* 5. 2. 4. has acknowledged this difference. And tho' the Roman writers, becauſe they uſe the words in another ſenſe, and make another diſtinction between contracts and pacts, do not always make uſe of the word *contrahere* in ſpeaking of things in commerce, or the word *paſciſci* in ſpeaking of things out of commerce; (for they ſay *contrahere nuptias*, l. 22. D. de ritu nupt. and *paciſci ab aliquo numos*, Val. Max. 9. 4. 2.) yet the word *contractus* is ſeldom or never uſed by them but to ſignify an agreement about things in commerce. This is ſo true, that the civilians (contra Donell. comm. juris, 13. 18.) deny *marriage* to be a *contract*, becauſe it relates to perſons and their inſeparable union, which are not things in commerce. We may therefore admit this difference between *contracts* and *pacts.*

Sect. CCCLXXXVI.

Why pacts are neceſſary.

Now, ſince men cannot live comfortably and agreeably, except they render one to another thoſe duties of *humanity* and *beneficence* which we have already defined (§ 214); and yet benevolence is become ſo cold and languid amongſt men, that we can hardly depend upon one another's humanity and beneficence for them (§ 326); and beſides, theſe are duties not of perfect, but imperfect obligation, * (§ 122), and therefore duties which cannot be extorted from the unwilling: for theſe reaſons, there is no other ſecurity for our obtaining them but another's obligation to us by his conſent; and therefore we ought thus to ſecure to ourſelves the performance of thoſe good offices by others to which we would have a perfect right. Now, this conſent of two or more to give, or do any thing which could not be otherwiſe exacted from them by perfect right, but was due merely in conſequence of the law of humanity and beneficence, is called a *pact*.

* The hiſtory of Abraham and Abimelech furniſhes us with an example. The law of humanity and beneficence required, commanded both of them, Abraham eſpecially, an upright pious man, who had received many favours from Abimelech, to behave kindly and graciouſly towards one another: natural reaſon obliged Abraham to gratitude: And yet we read, Geneſis xxi. 23. that they bargained or covenanted friendſhip the one with the other. And thus the ancients obliged one another by covenants to perform what they were previouſly obliged to by the law of humanity and beneficence.

Sect. CCCLXXXVII.

Such pacts ought to be fulfilled. A firſt argument to prove it.

Nor can it be queſtioned that ſuch pacts ought to be faithfully fulfilled. For ſince he who promiſes any thing, declares his mind, whether by words or other ſigns; and words are ſo to be uſed, that the perſon we ſpeak to may not be deceived (§ 196); the conſequence is, that all fraud, all lying, all falſhood ought to be far removed from thoſe who deliberately make covenants or pacts; and therefore that nothing ought to be held more ſacred than keeping faith, or more deteſtable than perfidy *.

* For as by pacts we in ſome meaſure ſupply our indigence; and we make covenants or pacts with others, that they may be obliged to render us thoſe good offices of humanity and beneficence, which we can hardly expect from them without ſuch pacts; it is plain that human life, and all the intereſts of ſocial commerce, depend upon fidelity in fulfilling them. Therefore Cicero ſays juſtly, pro Q. Roſcio comœdo, c. 6. "To break one's faith is ſo much the more baſe and attrocious, that human life depends upon faith." Hence unlying lips have always been reckoned a noble quality, as Euripides expreſſes it in Iphig. in Taur. v. 1064.

Καλόν τι γλωσσ᾽, ὅτῳ πίϛις παρῇ.
A faithful tongue is a beautiful thing.

Sect. CCCLXXXVIII.

A ſecond argument. There is a ſecond reaſon which every one will own to be of no leſs weight. And it is this, the love of juſtice is the ſource of all the duties we owe to one another (§ 173), and this love commands us not to do to others what we would not have done by them to ourſelves (§ 177). But ſurely none would deſire to be deluded by the promiſes and pacts of another. It is therefore our duty not to deceive any one by our pacts or promiſes; not to defraud one, by making him truſt to our fidelity; but faithfully and conſcientiouſly to perform what we engage to do *.

* We do not here uſe this argument, "That civil ſociety could not ſubſiſt without faith and honeſty." For tho' this argument proves the neceſſity of pacts, and of faithfulneſs amongſt mankind, and Cicero hath elegantly demonſtrated this neceſſity from this conſideration, "That without ſome ſhare of this juſtice, without faith and pacts

among themſelves, even thoſe who live by villainy and wickedneſs could not ſubſiſt." Yet we have already ſhewn, that the origine of moral obligation is not to be derived from this principle of ſociality (§ 75): And therefore we have rather choſen to give theſe two reaſons in the preceding ſections derived from our firſt principle of *love.*

Sect. CCCLXXXIX.

Pacts of ſeveral ſorts.

Pacts are either *unilateral* or *bilateral.* By the former, one party only is bound to the other; by the latter, both parties mutually oblige or engage themſelves one to another; and therefore this latter kind of pacts includes in them a tacite condition, that one is to perform his promiſe, if the other likewiſe fulfils the pact on his ſide. Both however are either *obligatory* or *liberative.* By the former, a new obligation is brought upon one or other, or upon both. By the latter, obligations formerly conſtituted are taken off. Again, pacts may be of a mixed kind; ſuch are thoſe by which former obligations are annulled, and new ones are conſtituted at the will of the parties covenanting. Of this kind principally, it is evident, are *novations* and *tranſactions* about doubtful or uncertain affairs. But there is one rule for them all, which is, that they ought to be faithfully and religiouſly kept, eſpecially if one hath not promiſed with an intention to lay himſelf under a ſtrict obligation *.

* This we add, in oppoſition to thoſe who aſſert, that there is a perfect and an imperfect promiſe; the former of which they define to be a promiſe, wherein the promiſer not only deſigns to be obliged, but actually transfers a right to another, to exact the thing promiſed from him as a debt: And the latter they define to be a promiſe wherein the promiſer deſigns indeed to be obliged, but not in ſuch a manner as that the thing promiſed may be exacted from him by the perſon to whom he promiſes it. To which kind they refer this way of promiſing, "I have purpoſed to give you ſuch a thing, and I deſire you may credit me." As likewiſe, the promiſes of great or com-

plaiſant men, when they promiſe one a vote or a recommendation, Grotius of the rights, &c. 2. 2. 2. Pufendorff of the law of nature, *&c.* 3. 5. 5. But, 1. Such promiſes are often not pacts, but words or aſſeverations only, which Grotius and Pufendorff themſelves diſtinguiſh from pacts: Yea, ſometimes, they are but preparations to pacts, or what is called treaties. 2. It is a contradiction to ſay, one wills to promiſe, and yet does not will to give a right to exact from him. It is a fiction, by which, if it be admitted, I know not what pacts and promiſes may not be baſely eluded, after the example of the Milaneſe, who being reproached with perjury, anſwered, "We ſwore indeed, but we did not promiſe to keep our oath." Upon which anſwer, when Radevicus de geſtis Friderici I. l. 2. c. 25. relates it, he juſtly ſays, "A ſuitable anſwer indeed, that their diſcourſe might be of a piece with their profligate manners; and that they who lived perfidiouſly and infamouſly, might ſpeak as wickedly as they lived, and their diſcourſe might be as impure and villainous as their actions." 3. Finally, tho' the promiſes of great men ſhould ſometimes be imperfect with reſpect to exaction, it does not follow from hence, that they are imperfect in reſpect of obligation.

Sect. CCCXC.

By the law of nature, naked or bare pacts oblige perfectly.

Hence we infer, that by the law of nature there is no difference between pact and ſtipulation; and therefore that Franc. Connanus, in his comment. 1. 6. is miſtaken, when, to exalt the excellence of the Roman laws, he denies that by the law of nature obligation ariſes from promiſes, as long as they are ſimple agreements, and are not converted into contracts. His arguments have been ſufficiently refuted by Grotius of the rights of war and peace, 2. 2. 1. and Pufendorff of the law of nature and nations, 3. 5. 9. We ſhall only add, that Connanus ſpeaks not in ſo high a ſtrain of the natural obligation of bare pacts as the Romans themſelves did, who never denied their perfect obligation, tho' they did not grant an *action* upon them for particular reaſons *.

* According to the Romans, one was perfectly obliged by a bare pact; and they looked upon him who broke his word with no leſs contempt than other nations. Beſides, they did not think the obligation imperfect which aroſe from ſuch bare promiſes as were not confirmed by ſtipulation, when there was place for compenſatio, l. 6. D. de compenſ. *conſtituto*, l. 1. § pen. D. de pecun. conſt. *novatio*, l. 1. fin. D. de novat. *fideijuſſoribus & pignoribus*, l. 5. D. de pign. *exceptio.* l. 7. § 5. l. 45. D. de pact. l. 10. l. 21. l. 28. C. eodem: Whence even what a promiſer paid by miſtake, could not be recovered *condictione indebiti*, l. 19. D. de cond. indeb. moſt of which caſes are of ſuch a nature that they can hardly be brought under the notion of imperfect obligation. The Romans only refuſed to grant an action upon bare pacts, becauſe they had contrived a certain *civil* method which they ordered to be uſed in agreements or pacts, *viz. ſtipulation*. Wherefore, as in ſeveral countries the laws do not grant an action upon the pawning of immoveable things, unleſs the pawn be regiſtered in the public acts, and yet theſe laws do not detract from the perfect obligation of pawn, which exerts itſelf in other ways; ſo neither did the Romans think that pacts did not produce a perfect obligation, becauſe they did not grant an action upon bare pacts.

Sect. CCCXCI.

Expreſs and tacite pacts.

A pact being the mutual conſent of two or more in the ſame will or deſire (§ 386); *i. e.* an *agreement* of two or more about the ſame thing, the ſame circumſtances; the conſequence is, that this internal conſent muſt be indicated by ſome external ſign. But ſuch ſigns are words either ſpoken or written, and deeds; the former of which make expreſs, the latter tacite conſent (§ 284); and therefore it is the ſame, whether perſons make a pact by expreſs, or by tacite conſent, provided the deed be ſuch as is held to be ſignificative of conſent by the opinion of all mankind, or of the particular nation *; nay, conſent is ſometimes juſtly inferred, from the very nature of the buſineſs, if it be of ſuch a kind, that a perſon cannot be imagined to diſſent (§ 284).

* Hence by the Roman law, a nod was reckoned conſent, l. 52. § ult. D. de obl. & act. Quintilian. declam. 247. Nay, ſubmiſſion and ſilence were reckoned conſent, l. 51. pr. D. locat. l. 11. § 4. 7. D. de interr. in jure fac. and elſewhere, which we likewiſe admit to be true, unleſs there be ſome probable reaſon why one might, tho' he did not aſſent, rather chooſe to be ſilent, than to teſtify his diſſent by words or deeds, *e. g.* if a ſon, afraid of a cruel father, being asked by him, whether he would marry Mavia whom he hated, ſhould be ſilent, he cannot be thought to have conſented. For what if a ſon, when ſuch a father bids him go hang himſelf, ſhould ſay nothing, would he therefore be deemed to have conſented?

Sect. CCCXCII.

Who can, and who cannot make pacts.

It is plain from the definition of a pact as requiring conſent (§ 391), that they cannot covenant who are deſtitute of reaſon, and therefore that the pacts of mad perſons are null, unleſs they were made in an evidently lucid interval from their madneſs; as likewiſe the pacts of infants, and of all whoſe age cannot be ſuppoſed capable of underſtanding the nature of the thing; or of ſuch perſons, whoſe minds are diſturbed by their indiſpoſition; or of perſons in liquor, even tho' their drunkenneſs be voluntary *; or finally, of thoſe who promiſed any thing to another, or ſtipulated any thing from another to themſelves in jeſt.

* For tho' in other caſes, an action done in drunkenneſs be imputed to one whoſe drunkenneſs was voluntary (§ 50), yet here another ſentence muſt be pronounced, and the degrees of drunkenneſs muſt be diſtinguiſhed. For either the promiſer was quite drunk, or only a little in liquor. Now, if he was quite drunk, that could not but be perceived by the party bargaining with him; and therefore, the latter either acted knaviſhly, or at leaſt he is blameable for covenanting with ſuch a perſon; ſo that there is no reaſon why, when the perſon has recovered from his drunkenneſs, ſuch a contracter ſhould have any right to demand the fulfilment of ſuch a promiſe. But if the perſon be not quite drunk, his promiſe muſt be obligatory, becauſe he

was not quite incapable of judging what and to whom he promiſed.

Sect. CCCXCIII.

Of pacts made by miſtake or ignorance.

From the ſame principle it follows, that pacts made thro' ignorance or miſtake are unvalid, if this fault of the underſtanding was culpable, vincible and voluntary (§ 107); but not, if it be of ſuch a nature, that the moſt prudent perſon is liable to it; (§ 108), as, if the covenanting perſons had different perſons and objects in their view; or if either of them was miſtaken about the perſon, or object, or any circumſtances of it which could not eaſily be known, and which, had he known, he would not have made the pact *.

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* By theſe rules may all the caſes be reſolved that are uſually put upon this head. Thus, for inſtance, the pact will not be valid, if one promiſed to eſpouſe a virgin, who is afterwards found to be pregnant, becauſe the moſt prudent perſon might have miſtaken in this caſe: Nor is the contract of marriage valid, if Afrania be betrothed to one in miſtake, inſtead of Tullia whom he had in view, but did not know her name; becauſe not having the ſame perſon in view, they did not conſent to the ſame thing: In fine, if Tullia after betrothment is found to be Epileptical, or liable to any other hideous diſeaſe, the betrother ſhall not be bound in ſuch a caſe, becauſe he was ignorant of, or in an error about a circumſtance which he could not eaſily diſcover, and which, if he had known, it is not probable he would have deſired the marriage.

Sect. CCCXCIV.

Of fraud or knavery.

Much leſs ſtill is a pact valid if one be led into it by the fraud or knavery of the other; or in which one is involved, and by which one is wronged by another's cunning and deceitfulneſs; becauſe he cannot be deemed to have conſented, who was ſo blinded or deluded by another's artful miſrepreſentations, that he had quite a different opinion of the perſon or object when he covenanted, than he afterwards found to be the caſe *. On the other hand, there is no reaſon why a pact ſhould be null when a third perſon induces one to make it without the other's knowledge, tho' in this caſe it be indiſputable, that the perſon by whoſe fraudulence the pact was made, is obliged to repair the damages of the perſons whom he hath thus injured.

Sect. CCCXCV.

Of force and fear.

And ſince nothing can be more repugnant to conſent than force and fear; nor can an action be imputed to one, if he was forced to it by one who had no right to force him (§ 109); hence it is clear, that one is not bound by his promiſe to a robber, or to any one who unjuſtly uſes violence againſt him. But a pact is not invalid, if it be made with one who had a right to uſe violence; and much leſs is a pact null, if not he to whom the promiſe is made, but a third perſon, without his knowledge, uſed violence, or was the cauſe of the pact *. Nor is a pact invalid, if the perſon forced to it, afterwards freely conſents and confirms his promiſe, becauſe he then becomes obliged, not by his firſt promiſe

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* Hence none will ſay, that Jacob's marriage with Lea was valid by the law of nature, ſince it was brought about by the fraudulence of Laban, Gen. xxix. 22. Nor was the cuſtom of the country, by which Laban pretended to exculpate himſelf, ſufficient to excuſe him, or to oblige Jacob to ſubmit, and ſuffer himſelf to be ſo maliciouſly deceived by his father-in-law. For that cuſtom was not obligatory; and if it really had been received as a law, Jacob ought to have been pre-admoniſhed of it, and Laban ought not to have promiſed Rachel to Jacob, but to have acquainted him, who was a ſtranger, that by the cuſtoms in Syria, the younger ſiſter could not be betrothed before her elder ſiſter. This tranſaction was therefore full of knavery, nor could it have been valid, had it not ſeemed better to Jacob, who was a ſtranger, to put up the injury, than to involve himſelf in an ambiguous ſuit.

promiſe extorted from him by force and fear, but by his after voluntary conſent (§ 109).

* For ſince imputability ceaſes, if one be neither the cauſe nor doer of a thing (§ 105), but in this caſe, he to whom a promiſe is made, is neither the author nor cauſe of the violence by which the other was forced to promiſe, the violence cannot be imputed to him. Thus, *e. g.* if any perſon in imminent danger from robbers or pirates, ſhould hire a convoy at a high price, it would be in vain for him to pretend to his convoy, when the hire is demanded, that he promiſed it in fear of robbers. So Seneca decides the matter, Controv. 4. 27.

Sect. CCCXCVI.

The conſent of the parties ought to be mutual.

Moreover, ſince a pact conſiſts in the conſent of two or more to the ſame thing (§ 386), it is very plain that this rule muſt hold not only in bilateral, but likewiſe in unilateral pacts; and therefore a promiſer is not bound, unleſs the other ſignify that the promiſe is agreeable to him. But this may be juſtly preſumed, either from the condition of the perſon to whom the promiſe is made; or from the nature of the thing promiſed; or from antecedent requeſt, provided, in this laſt caſe, the ſame thing that the other had demanded be promiſed.

Sect. CCCXCVII.

What with regard to impoſſible things.

Again, becauſe pacts are made about ſomething to be performed (§ 386), but impoſſible things cannot be performed, and therefore the omiſſion of them is imputable to none (§ 115); the conſequence is, that pacts about things abſolutely impracticable are null: no obligation ariſes from them, unleſs the thing, at the time the pact was made, was in the power of the promiſer, and he ſhall afterwards deſtroy, by his own fault, his power to fulfil his promiſe; or unleſs one fraudulently promiſed a thing not abſolutely impoſſible, but which he knew to be impracticable with regard to him (§ 115).

Sect. CCCXCVIII.

What with regard to immoral things.

And ſince thoſe things are juſtly reckoned among *impoſſibles*, which, tho' not impoſſible in the nature of things, yet cannot be done agreeably to the laws and to good manners (§ 115); hence it is evident, that pacts and promiſes contrary to the laws of juſtice and humanity, or even to decency, modeſty and honour, (and which, for that reaſon, we ought to be judged not to be capable of doing, as Papinianus moſt juſtly and philoſophically ſpeaks, l. 15. D. de condit. inſtit.) are not valid. A perſon is not obliged to fulfil a promiſe by which he engaged to commit any crime; nor is he who promiſed to pay one a reward for perpetrating any crime bound by ſuch a promiſe; and therefore all pacts about baſe and diſhoneſt things, whether unilateral or bilateral, are of no effect.

* For it is manifeſtly contradictory, that the law of nature ſhould confirm pacts contrary to itſelf; that it ſhould at the ſame time prohibit a pact, and command it to be fulfilled; or that a pact ſhould be at one and the ſame time null, and yet obligatory. And therefore, a pact is departed from without perfidy, which could not be fulfilled without committing a crime. Nor does he deſerve the character of faithful, who performs what he cannot do without incurring guilt. And for this reaſon the nurſe gives an excellent anſwer to Dejanira, when ſhe would have her to promiſe ſilence.

Præſtare, fateor, poſſe me tacitam fidem,
Si ſcelere careat, interim ſcelus eſt fides.
Seneca in Herc. Oeteo. Act. 2. v. 480.

Sect. CCCXCIX.

What with regard to detrimental promiſe.

Hence again we infer, that one is not obliged to perform promiſes, the fulfilment of which would manifeſtly be detrimental to the other, tho' this other ſhould urge the fulfilment of the promiſe to his own ruin. For ſince we are forbid to injure any perſon by the law of nature (§ 178), and none can make pacts contrary to the law of nature, (§ 398), no pact by which another is hurt can be valid; and he who keeps ſuch a promiſe, even to one who inſiſts upon the fulfilment of it, is no leſs deſerving of puniſhment, than he who hurts one againſt his will, and by force *.

* Nor can the maxim, *volenti non fieri injuriam*, be oppoſed to this doctrine. For we have already ſhewn, that this maxim does not take place when it is unlawful to conſent. But it is unlawful to conſent to what God hath prohibited by right reaſon, or by his revealed will. For this reaſon, tho' Saul being wounded, had begged the young man to ſlay him, yet he was ſo far from eſcaping unpuniſhed for conſenting to this requeſt, that David ordered him to be put to death as guilty of Regicide, 2 Sam. i. 15, *&c.*

Sect. CCCC.

What with reſpect to pacts about the deeds and things of others.

Beſides, becauſe we make pacts about thoſe things which we deſire to have a perfect right to exact from others (§ 386); but thoſe things can neither be done, nor given, which are not at our diſpoſal, but ſubject to the dominion of another perſon; we have therefore reaſon to deny that one can make a valid pact about things belonging to others, without commiſſion from the owner, or even about his own things, to which any other hath already acquired ſome right by a prior pact. He indeed who hath engaged to uſe all his diligence to make another give or do, is obliged to fulfil that promiſe *. Yea, he is obliged to anſwer for the value of it, if he hath engaged himſelf to get another to give, or do a thing to any one; but he to whom a third perſon hath made ſuch a promiſe, hath no right to exact the thing or deed, thus promiſed to him, from the perſon to whom it belongs to diſpoſe of it. See Hertius de oblig. alium datur. facturumve.

* For ſince he hath promiſed no more than his help and diligence, the other hath no right to exact more from him.

And in general, as often as one ſtipulates ſomething to himſelf, which he knew, or might have known not to be in another's power; ſo often is the Promiſſor diſcharged from his promiſe, by uſing all his diligence. This is elegantly expreſſed by Seneca of benefits, 7. 13. " Some things are of ſuch a nature, that they cannot be effectuated; and in ſome things it is to do them, to have done all that one could in order to effectuate them. If a phyſician did all in his power to cure one, he hath done his part. Even tho' a perſon be condemned, an advocate deſerves the reward of his eloquence, if he exerted all his skill. And praiſe is due to a General, tho' he be vanquiſhed, if he exerted all due prudence, diligence and courage."

Sect. CCCCI.

What with regard to conditional pacts, &c.

From the ſame principle, that promiſe to give or do conſiſts in the conſent of both parties (§386), it manifeſtly follows, that it depends upon the parties to make a pact *with*, or *without conditions*, and any agreement with regard to *time* they pleaſe; and that theſe circumſtances ought to be obſerved by the perſons engaging, provided what regards the condition truly makes the effect of the pact depend upon an uncertain event; *i. e.* provided it be truly a *condition*. Whence it is plain, that what is promiſed under what is called *an impoſſible condition*, is not obligatory, ſince ſuch an additional clauſe hardly deſerves to be termed *a condition* *: and thoſe who have promiſed or ſtipulated what they foreſaw could not be done, muſt be deemed either to have been in jeſt, or to have been mad: in the firſt of which caſes, they muſt be judged not to have conſented; and in the other of which they muſt be judged not to have had it in their power to have conſented (§ 392).

For a condition is a certain circumſtance expreſſed by the ſtipulating parties, by which the effect of the pact is ſuſpended, as by an uncertain event. But ſeeing *impoſſible* does not mean an uncertain event, but an event which it is certain cannot happen, it is plain that ſuch a circumſtance does not ſuſpend the effect of a pact, and therefore it is not a condition. Miltiades therefore cavilled, when he required the Lemnians to ſurrender their city according to their pact, becauſe, coming from home he had arrived at Lemnos by a north wind, Nepos, Miltiad. c. 1. and 2. For the Lemnians meant Athens: nor could Miltiades underſtand the Lemnians in any other ſenſe, ſince he at that time had no home but at Athens. The condition was impoſſible, and therefore rendered the pact null; eſpecially ſeeing the Lemnians might eaſily have been perceived by Miltiades to have ſpoken in jeſt and to banter him.

Sect. CCCCII.

What with regard to a baſe condition.

But ſince baſe and diſhoneſt things are juſtly reckoned amongſt impoſſibles (§ 115), and what is promiſed upon an impoſſible condition is null and void, (§ 401); and ſince in general it is unlawful to make pacts about baſe or diſhoneſt things (§ 398); hence we may juſtly infer, that baſe and diſhoneſt conditions render a pact null *; and that he who promiſed upon ſuch a condition is not bound to fulfil his promiſe; but that if it be fulfilled, he is juſtly liable to puniſhment for having done a crime; as is the other party likewiſe, being, by making ſuch a condition, the moral cauſe of that crime (§ 112).

* For a particular reaſon, the Romans held conditions, whether phyſically or morally impoſſible, in teſtaments, as not written, not exiſting, § 10. Inſt. de her. inſt. l. 1. l. 19. D. de condit. Inſt. l. 8. & l. 20. D. de condit. & dem. For as it ſeemed abſurd to indulge jeſting and trifling to a teſtator in ſo ſerious an affair; ſo neither could the omiſſion of an impoſſible action be deemed fraud in an heir, ſince he could never have conſented to it (§ 115). And hence by the Roman law they would have got their legacies which were left to them by Eumolpus in Petron. Sat. cap. 91. tho' they had not fulfilled the condition. "All who have legacies by my teſtament, except my children, ſhall only have them upon condition that they cut my body into pieces, and eat it up publickly." But ſince, in our opinion, the law of nature knows no other laſt-wills beſide thoſe which are done by way of pact (§ 291), all that hath been ſaid of pacts is

applicable to laſt-wills; ſo that the law of the Thebans was abſurd, which ordered ridiculous conditions to be performed, as that one who had flattered a woman in order to be her heir, ſhould carry her naked corps beſmeared with oil upon his ſhoulders.

Scilicet elabi ſi poſſet mortua, credo,
Que nimium inſtiterat viventi.

Hor. Serm. 2. 5.

Sect. CCCCIII.

Whether one may not promiſe and covenant by another?

Moreover, ſince one may aſſiſt another, or promote his advantage by means of a mandate, or by undertaking his buſineſs without a commiſſion (§ 346), we muſt conclude, that it is the ſame whether one promiſe and make a pact in perſon, or another do it for him by his order. But ſince he who undertakes another's buſineſs without a commiſſion from him, is obliged to manage it to his advantage (§ 348), which he does not do, who is liberal of another's goods, and gives any thing of another's away without the owner's conſent (§ 400); the conſequence is, that he who undertakes another's buſineſs without a commiſſion, may ſtipulate to that perſon; (ſo that this rule in the Roman law is not agreeable to natural equity, "That none can ſtipulate to another, unleſs he be under ſubjection to him, § 4. Inſt. de inut. ſtip.) but he cannot promiſe for him without his knowledge; and ſuch a promiſe does not bind the owner.

Sect. CCCCIV.

What hath been ſaid of pacts extends likewiſe to contracts.

Finally, becauſe, as we obſerved in the beginning of this chapter, there is no diſtinction, by the law of nature, between pacts and contracts, both deriving all their ſubſiſtence and force from conſent (385), it is evident, that all the rules which have been laid down in this chapter, do no leſs belong to contracts than to pacts; and that one does not proceed in a wrong method, who deduces the nature of contracts from the nature of pacts, and ſo begins by conſidering the latter.

CHAP. XV.

By what means obligations ariſing from pacts and contracts are diſſolved.

Sect. CCCCV.

General axioms.

WE have already proved that pacts ought to be religiouſly fulfilled, and that nothing is more ſacred than one's pledged *faith* (§ 387); but by *faith* is meant nothing elſe but the performance of promiſes and pacts; (and therefore Cicero de off. 1. 6. juſtly, tho' not exactly according to etymological rules, ſays, " Fidem appellatam, quia fiat, quod dictum eſt.") Hence then we infer, that thoſe who covenant have then attained to their end, when they have ſatisfied the terms of their covenant, and what was agreed upon is done. But the end (which according to the philoſophers, is firſt in intention, and laſt in execution) being obtained, or being of ſuch a nature that it cannot be obtained (§ 397), the obligation ariſing from a promiſe or pact muſt ceaſe *.

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* The civil law diſtinguiſhes between the ways by which obligation is removed *ipſo jure*, in the nature of the thing, and the ways by which it is taken off by *exception*. When the obligation is cancelled by any deed of the parties contracting, as by paying, compenſation, acquittance, *&c.* then it expires *ipſo jure* by the nature of the thing. But if it be diſſolved on the account of equity, it is ſaid to be removed by an *exception*. But tho' we do not think this diſtinction quite idle, or without foundation, (upon which ſee an excellent diſſertation by Hen. Cocceius de eo quod fit ipſo jure) yet it will eaſily be granted to us, not to be of the law of nature, by thoſe who are acquainted with the judiciary affairs of the Romans, and the reaſon which induced them to make this diſtinction.

Sect. CCCCVI.

Of the firſt way by payment.

Since an obligation ariſing from a pact or promiſe ceaſes when it is fulfilled, and that which was agreed upon is done (§ 405); the conſequence is, that it ceaſes by payment, which is nothing elſe but the natural performance of the thing promiſed or agreed upon. But it is the ſame thing to him who is to be paid, by whom he be paid, provided the thing itſelf which was owing to him, or, (if it be a conſumeable commodity) the equivalent be paid to him (§ 364); becauſe thus the obligation to him is naturally diſcharged. So, for the ſame reaſon, it is evident, that he who is under an obligation by his pact, is not delivered from that obligation when another offers to fulfil it for him, if it be of ſuch a nature as not to admit of being performed by another in his room *.

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* This happens as often as a perſon's quality or virtue engaged one to make a pact with him. And therefore, if *Titia* be obliged by contract of marriage to marry *Sempronius*, ſhe is not freed from this obligation, tho' *Sulpicia* ſhould be ever ſo ready and willing to fulfil the contract in her ſtead, becauſe *Sempronius* choſe *Titia* for her age, her figure, her perſonal good qualities, and it is not the ſame to him whom he eſpouſes. On the contrary, to a lender it is the ſame, whether he receive the book he lent from the perſon who borrowed it, or from another with whom he had nothing to do: And it is the ſame to a creditor, whether he receive his money and intereſt from his debtor, or from a third perſon unknown to him, becauſe thus the thing in obligation is naturally performed.

Sect. CCCCVII.

What, and to whom payment ought to be made.

From the ſame principle we infer, that the ſpecies is to be reſtored, if the uſe or cuſtody only of an inconſumeable thing was granted; and the ſame in kind and quantity, if the uſe of a conſumeable thing was granted; that one thing cannot be obtruded upon a creditor for another againſt his will;

and much leſs can he be forced to accept of a part for the whole; or to take payment later, or in another place than was agreed upon in the contract *; becauſe, in all theſe caſes, the thing in obligation is not naturally performed (§ 307). Further, it is plain, from the ſame principle, that we are to pay to no other but our creditor, provided the laws allow him to receive payment, or to him to whom he has ceded his right, or given commiſſion to receive payment; for otherwiſe, tho' the thing in obligation is performed, yet it is not fulfilled to him to whom one is debtor by the contract (§ 406).

* For tho' neceſſity may require ſome indulgence to a debtor, and tho' the laws of humanity may often oblige a creditor to remit a little of his rigour, we are here ſpeaking of right; and by it pacts and contracts ought to be punctually and faithfully performed. "For, as Cicero ſays, Off. 2. 24. nothing cements or holds together in union all the parts of a ſociety, as faith and credit, which can never be kept up, unleſs men are under a neceſſity of honeſtly paying what they owe one to another."

Sect. CCCCVIII.

The ſecond way, Compenſation.

Again, becauſe obligation ceaſes when a contract is fulfilled, and with reſpect to conſumeable things as much is held for the ſame (§ 364); the conſequence is, that obligation is removed by *compenſation*, which is nothing elſe but balancing debt and credit, both of which have a certain value, one with another *.

* There is yet another reaſon: For ſince he is paid who gets what was owing to him (§ 406), and he to whom a conſumeable thing was owing, gets it when he gets as much (§ 363); it follows, that in ſuch a caſe, he who any way receives as much as was owing, is paid; and therefore, compenſation is but a ſhort way of paying; and it is moſt reaſonable that it ſhould have the ſame effect as payment.

Sect. CCCCIX.

What is juſt with regard to it.

From the definition of compenſation it is plain, that it can only take place among thoſe who are mutually owing one to another, and therefore that another's debt to me cannot be obtruded upon my creditor. Compenſation has place with reſpect to conſumeable things, which, ſince they do not regularly admit of price of fancy, have always a certain value; but ſpecies cannot be compenſated by ſpecies, nor a thing of one kind by a thing of a different kind, nor perſonal performances by like performances, becauſe all theſe things admit of a price of affection, and are of an uncertain value. In fine, compenſation, even by unequal quantities, amounting to the ſum, holds good, tho' it does not appear reaſonable to deſire to compenſate a clear debt by one not ſo clear or contended for *.

* Much leſs does he act juſtly, who would compenſate a clear debt by this conſideration, that he hath abſtained from injuring his creditor by unjuſt violence, becauſe in this caſe plainly there is no mutual obligation. It was therefore a very odd way of compenſation by which Vitellius ſatisfied his creditors, Dion. Caſſ. Hiſt. l. 65. p. 735. " When he went into Germany he was ſo embroiled in debt, that his creditors would ſcarce diſmiſs his perſon upon any ſecurity; but a little after, when he was made Emperor, and returned to Rome, they hid themſelves. And he ordering them to be brought before him, told them that he had reſtored them ſafety for their money, and demanded back the bonds and inſtruments of contract." As if a robber could reckon it for credit to a traveller, that when he had it in his power to murder him, he had only robbed him, without ſhedding one drop of his blood.

Sect. CCCCX.

A third way, Acquittance.

Moreover, ſince every one can abdicate his own right (§ 13), an obligation may likewiſe be diſſolved by acquittance or voluntary remiſſion, by which we underſtand a creditor's voluntary renouncing his right of exacting a debt. And ſince it is the ſame whether one manifeſts his will by words, or other ſigns (§ 195), it is alſo the ſame whether one renounces his right to a debt by words or by deeds, as by giving up, tearing or burning the bond, provided ſome other intention of the creditor be not evident, or the bond be not deſtroyed by the creditor, but by another without his order, or be not rather accidentally loſt, deſtroyed or effaced, than by the will of the creditor *.

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* Thus the Romans might juſtly ſay, that their taxes and other fiſcal debts were remitted to them, when Hadrian with that deſign burnt all their bonds and obligations, that by ſuch a ſtupendous liberality he might win the affections of the people, Spartian. Had. cap. 6. But a debtor would moſt abſurdly conclude ſo, if his creditor ſhould deliver him his bond in order that it might be drawn up in a new and better form, or if his bond was burnt by accidental fire. And hence we may ſee, why it hath always been pronounced moſt iniquitous in the Roman people, for one plunged in debt, *novas tabulas poſtulare*, *i. e*, to demand a remiſſion of his debt from the magiſtrates or tribunes of a turbulent genius. For thus the acquittance came not from the creditors, but from magiſtrates profuſe of what did not belong to them, and whoſe office and duty it was to render juſtice to creditors, inſtead of liberating debtors againſt the will of creditors. This practice, of moſt pernicious example, was firſt put in uſe by Sylla, Liv. Ep. l. 88. And that Cataline expected the ſame, and that the people expected the ſame from Cæſar is manifeſt, tho' men of that turbulent ſpirit were then diſappointed, Saluſt. Catil. cap. 21. Cæſar de bello civili, 3. 1. Sueton. Jul. cap. 42. Plutarch. Solon. p. 86.

Sect. CCCCXI.

A fourth way. Mutual diſagreements.

Moreover, ſince any one may reſign his right, and remit a debt due to him (§ 410), it follows, that both parties in a bilateral contract, may by mutual agreement diſſolve their contract, eſpecially, *ſince nothing is more natural, than that a thing may be diſſolved in the way it was formed*, l. 35. D. de reg.

jur. But ſo, that this manner of diſſolving an obligation cannot have place, if the poſitive laws ordain a contract to be indiſſolveable: ſuch as matrimony now is amongſt Chriſtians, which among the Romans, might, as is well known, be diſſolved by conſent.

Sect. CCCCXII.

Whether obligation be diſſolved by treachery?

But becauſe the obligation of a bilateral contract can only be diſſolved by mutual conſent (§ 411), the will of one of the parties does not diſſolve it; and therefore the treachery of either party does not diſſolve the contract, as Grotius of the rights of war and peace, 3. 19. 14. and Pufendorff of the law of nature and nations, 5. 11. 9. ſeem to think. For even he who does not fulfil his part, remains obliged to do it, becauſe he cannot liberate himſelf by his own ſingle will from an obligation, which can only, as hath been ſaid, be diſſolved by mutual conſent, and the other has a right to compel him to fulfil his pact; tho' if the latter will not uſe his right *, then the obligation ceaſes on both ſides, becauſe it is now removed by the conſent of both (§ 411).

Sect. CCCCXIII.

The fifth and ſixth way. The term elapſed, and the condition not fulfilled.

But ſeeing any circumſtance may be added to a pact, and theſe circumſtances muſt be obſerved (§ 401), it is evident that an obligation being conceived *ex die*, *i. e.* ſo that what is promiſed cannot be demanded till a certain day, it cannot be demanded before that time fixed: But if it be conceived *in diem*, within the compaſs of a certain time, then when that day comes, the obligation is diſſolved *ipſo jure* *. And the condition upon which the effect of a pact depended not taking place, obligation is diſſolved for the ſame reaſon, unleſs one being ready to fulfil his part of the pact, is hindered either by his party or a third perſon, without whom the pact could not be fulfilled.

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* But either can do that, if the other will not fulfil the pact. For in every bilateral contract, this condition is ſuppoſed, that the one is obliged to perform what he promiſed, if the other performs his part (§ 379). If one therefore does not ſatisfy his promiſe, the condition fails upon which the obligation depended (§ 401), and therefore the obligation of both ceaſes.

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* Therefore, this rule of the Roman lawyers hath too much of ſubtlety in it, *viz.* ex contractu ſtricti juris non poſſe ad tempus deberi, *&c.* § 3. Inſt. de verb. oblig. l. 4. pr. D. de ſerv. l. 44. § 1. D. de obl. & act.

Sect. CCCCXIV.

The ſeventh manner.

Beſides, there are obligations which are contracted with an eye to a certain perſon, and his qualities; but theſe are of ſuch a nature, that they cannot be performed by other perſons (§ 406) : And therefore it is clear, that theſe obligations cannot paſs to heirs and ſucceſſors, and that they expire with the death of the promiſer. Something like this we obſerved with reſpect to the obligation of a betrother, and of one who accepteth of a commiſſion or truſt. But this way of obligation's being diſſolved, does not belong to other obligations, which can be fulfilled out of the goods of the perſon obliged; becauſe theſe, as admitting of performance in the room of the perſon obliged, are juſtly tranſmitted to heirs, as we have ſhewn in its proper place (§ 305).

Sect. CCCCXV.

The eight change of ſtate.

The caſe is the ſame, if we are bound to perform any thing as being in a certain ſtate. For it is the ſame, as if the promiſe had been made upon condition this ſtate ſhould continue. And therefore the condition failing, the obligation likewiſe ceaſes (§ 413 :) Thus he who contracted as a manager, his adminiſtration being at an end, is no more bound, the obligation being ſolely founded upon his ſtate as adminiſtrator, l. ult. D. de Inſtit. act. l. 26. C. de adm. tut. But this is only true of obligations ariſing from pacts or poſitive law, and not of thoſe which ariſe from the law of nature *.

Sect. CCCCXVI.

The ninth.

Moreover, ſince the obligation ceaſes if the end be ſuch as cannot be obtained (§ 406), he muſt be delivered from his obligation who promiſed the ſpecies itſelf, if it be quite loſt by accident, unleſs he promiſed it for a certain value, or as it were in part of payment; and the firſt obligation be not removed by renovation. Beſides, ſince impoſſibility is no excuſe, if one be in fault or delay, it is evident that he ought to bear the loſs who is in fault or delay; and therefore, all that was ſaid above concerning the risks in buying and ſelling takes place and might be repeated here (§ 353).

Sect. CCCCXVII.

The tenth, novation and delegation.

In fine, ſince one may pay by another (§ 407), and remit an obligation to another (§ 411), and parties may depart from a pact by mutual conſent, and introduce a new obligation, which laſt kind of agreement we called above *a mixed pact* (§ 389), it follows, that any one may remit to another his former obligation, and accept a new one from him in its place, which is called *renewal* or *novation*; or if it be about matters ſubject to contention and diſpute, *tranſaction*, and that a creditor may remit

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* Thus the ſpecial duties owing to a city by one as conſul, ceaſe ſo ſoon as one ceaſes to be conſul. Thus likewiſe the duties of a ſon, as far as they proceed from poſitive law, ceaſe, ſo ſoon as the ſon is no longer under paternal power. But the duties to which the law of nature binds him, ſuch as obedience, reverence, gratitude, remain after emancipation, nor can they be refuſed to parents by children no longer under paternal power.

a debtor, upon condition that another, whom he approves of, be ſubſtituted in his place, which is called *delegation*, and that novation ought to be made in expreſs words, or by the moſt evident ſigns, and that delegation muſt be done with the united conſent of all concerned in the affair; and, in fine, that there is a great difference between delegation and ceſſion, by which a creditor transfers an action againſt his debtor to another, without his debtor's knowledge, and againſt his will.

REMARKS on this Book.

Our Author may perhaps be thought by ſome to have mentioned ſeveral caſes; as for inſtance, with regard to alluvion, caſting up of iſlands, &c which are rather curious than uſeful. But let me anſwer to ſuch objections againſt our Author, (Grotius, Pufendorff, and other writers on the law of nature,) 1. That of as little uſe as theſe queſtions may appear to us, they were not ſo in other countries, ſuch as Egypt, where, as Strabo obſerves, Geograph. l. 17. p. 1139. edit. Amſt. "They were obliged to be particularly exact and nice in the diviſion of their lands, becauſe of the frequent confuſion of boundaries, which the Nile, by its overflowing occaſioned, taking from one part, and adding to another, changing the very form and look of places, and entirely concealing thoſe marks that ſhould diſtinguiſh one man's property from another's. For which reaſon, there was a neceſſity for their often making new ſurveys, *&c.*" And it is ſo ſtill in Holland and other countries, in ſome meaſure; nay ſome ſuch caſes may and do happen in every country, where there are large and impetuous rivers, *&c.* 2. But however rarely any ſuch caſes may happen, yet as one cannot be an expert, ready natural philoſopher, without having run through many poſſible caſes, and determined how gravity, elaſticity, or any other phyſical powers, would operate in theſe circumſtances according to their laws of working; and therefore, ſuch exerciſe is by no means uſeleſs, but highly uſeful: So for the ſame reaſon, one cannot be ready and expert in the moral ſcience, ſo as to be able readily to determine himſelf, or adviſe others how to act upon every emergency, without having practiſed himſelf in reſolving all, or very many poſſible caſes, *i. e.* in determining what is requiſite in ſuch and ſuch caſes, in order to do the leaſt harm, and render every one his due. Thus, it is evident, muſt one prepare himſelf for being able to judge readily what ought to be the general rules of juſtice in ſtates with regard to different caſes. Thus alone can one prepare himſelf for judging of caſes in enacting, abrogating or mending laws. And indeed the proper way of ſtudying the laws of any particular country, is by comparing them all along with the dictates or the laws of nature concerning the ſame caſes, in an orderly way, proceeding from ſimple to more and more complex caſes gradually. Whence it is evident, that one well verſed in the knowledge of natural law, can never be at a loſs to find out what ought to be the general poſitive law in certain caſes, and how poſitive law ought to be interpreted in caſes, which, tho' not expreſly excepted in a law, which muſt be general, yet are in the nature of things excepted. 3. The ſame thing holds with reſpect to the duties of ſocieties, one towards another, for the laws by which particular perſons ought to regulate their conduct in all pacts, covenants, bargains or contracts, under whatſoever denominations they are brought by the doctors of laws, are the very rules by which ſocieties ought likewiſe to regulate their conduct one towards another; ſocieties being, as we ſhall find our author himſelf obſerving afterwards, moral perſons. Whence it follows, that the former rules or laws being determined, it cannot be difficult to fix or determine the latter. And indeed our Author having fixed the former in ſuch a manner, that there was almoſt no occaſion to differ from him, and but very little occaſion to add to him; in following him while he deduces aud fixes the other in the ſucceeding book, there will be very little need of our adding any remarks, except in the affair of government, that not having been diſtinctly enough handled by any writer of a ſyſtem of the law of nature and nations, for this reaſon that, as we have already had occaſion to obſerve, none of them has ever conſidered government in its natural procreation, or its natural cauſes. Nor do I know any author by whom that hath been done but our Harrington, tho', as he himſelf ſhews, the principles upon which he reaſons were not unknown neither to ancient hiſtorians, nor to ancient writers on morals and politics. It will not therefore be a diſadvantage to young readers, for whom this tranſlation, with the remarks, is chiefly intended, in order to initiate them into this uſeful ſcience, if we, upon proper occaſions, in the following book concerning the laws of nations, add a few things to ſet the more important queſtions about government in a clear light. On this ſubject, we of this nation, and we only, dare write freely. For our happy conſtitution is the bleſſed effect of thinking freely on this matter; and it muſt laſt uncorrupted, unimpaired, while we continue to exerciſe the right to which we owe it: A right without the exerciſe of which men are not indeed men. For who will ſay that ſlaves, who know not the price of liberty, or who know not that they are ſlaves, deſerve to be called men!

The end of the firſt book.

ERRATA.

PAge 44. § 66. l. 7. for *communication* read *commination.* p. 61. l. 12. for *another* read *to others.* p. 62. l. 9. read *can be.* p. 64. l. 45. for *to him* read *to man.* p. 67. l. 15. read *and a.* p. 130. § 184. l. 2. read *lays ſnares.* p. 143. § 203. l. 8. for *is* read *are.* p. 176. § 240. l. 2. for *in the property of many* read *in the community of many.* l. 3. for *or* read *and.* p. 190. l. 7. for *the other* read *he.* l. 8. for *to him* read *to the other.* l. 10. for *the other* read *him.* p. 199. l. 42. for *would* read *could.* p. 214. l. 3. for *money* read *pawn.* p. 239. ſchol. l. 4. for *what* read *which.* p. 279. § 361. l. 7. for *or cannot* read *or that he himſelf cannot.*